Supreme Court, U.S.
FILED
98 74 JUL 6 1998
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No. 98-__

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

JOSEPH W. TEAGUE and HELEN B. TEAGUE,
STEVEN ALLEN BARKER, RITA STRAHOWSKI,
SWANNEE BECK, and KAREN PEREZ TUCKER,
Lifetime Partners of PTL,
As Representatives of a Nationwide Class
consisting of 150,290 PTL Lifetime Partners
and of 27,839 Persons Who Partially Paid for
Lifetime Partnerships,
Plaintiffs - Petitioners

v.

JAMES O. BAKKER,
DAVID A. TAGGART, and AIMEE CORTESE
Defendants - Respondents

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fourth Circuit securities law decision on the *Howey* test conflicts with other Circuits and with this Court, by claiming to hold as a matter of first impression that a fourth element must be added to the *Howey* test where an investment was made because of economic inducements for both profit and use, while ignoring this Court's contrary decision in its only mixed investment-use decision (*United Benefit Life*). The Fourth Circuit added to the *Howey* test that there is no security unless the investment was "primarily" for profit and not "primarily" for use. This pivotal jury instruction exempted from securities law protection both Jim Bakker's sale of over $160,000,000 of PTL Lifetime Partnerships to over 150,000 people after soliciting over 1,000,000 people, and the rest of a $10 billion per year industry.

2. Whether the Fourth Circuit securities decision on the risk capital test conflicts with other Circuits, by holding as a matter of first impression that it is not enough to meet the usual elements of the risk capital test, where an investment by PTL Lifetime Partners was for both profit and use (as is typical of risk capital cases), and that an additional element of the risk capital test to have a security is that the investment was "primarily" for profit and not "primarily" for use.

3. Whether the Fourth Circuit self-incrimination decision conflicts with the District of Columbia Circuit and this Court, by holding that a convicted crimi-

nal (Jim Bakker) had not waived and could claim the privilege against self-incrimination in a civil securities trial on matters about which he testified at his prior criminal trial and in PTL's bankruptcy proceedings. This critical exclusion of testimony allowed Jim Bakker, the defendant in the civil securities trial, to refuse to testify about the nature of the economic inducements and his negligence in selling PTL Lifetime Partnerships.

LIST OF PARTIES

The parties to the proceedings below were the plaintiff-petitioner PTL Lifetime Partner class (certified by the district court), and the defendant-respondents Jim Bakker, David Taggart, and Aimee Cortese.[6]

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[6]In this petition, all emphasis is added unless otherwise indicated.

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The opinion of the U.S. Court of Appeals in the earlier appeal is reported at 35 F.3d 978 (4th Cir. 1994) (relevant part in Appendix at 40-55).

STATEMENT OF JURISDICTION

Federal jurisdiction exists under 28 U.S.C. § 1331. The Fourth Circuit entered its opinion April 8, 1998. This Court's jurisdiction is under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This petition involves the definition of a security under Securities Act § 77b(1), 15 U.S.C. § 77b(1) (quoted in Appendix at 56).

STATEMENT OF THE CASE

A. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION IN THE COURT BELOW.

The plaintiffs in this case are a certified class of over 150,000 PTL Lifetime Partners (R.Doc.198, A.601-02), who each paid an average $1,000 for a PTL investment program. The defendants are Jim Bakker, PTL's President and a director, David Taggart, the Vice President for Executive Offices (1990 Tr. 1953) and primary Bakker assistant, and Aimee Cortese, a PTL direc-

tor. The complaint alleged securities liability under both fraud and negligence grounds. The basis of jurisdiction was principally 28 U.S.C. § 1331.

In the 1990 trial, the district court, while permitting other claims to go to the jury, granted a directed verdict on securities claims on the sole ground that Lifetime Partnerships were not securities. Thus, securities liability claims against Bakker did not go to the jury. The jury rendered a $129,000,000 verdict against Bakker for common law fraud, but was not allowed to address these securities issues. Bakker has not paid any of the $129,000,000. (A.190,192.)

In its 1994 decision, the U.S. Court of Appeals for the Fourth Circuit held that "the district court erred in granting appellees' motion for a directed verdict on plaintiffs' federal securities fraud claim" involving Lifetime Partnerships. It also held that aiding and abetting liability no longer existed under Rule 10b-5 and the parallel North Carolina statute by virtue of this Court's intervening decision in *Central Bank of Denver, N.A. v. First Interstate Bank.* 114 S.Ct. 1439 (1994). *Teague v. Bakker,* 35 F.3d 978, 991 (4th Cir. 1994). The panel remanded the case for trial of the securities claims against Bakker and for proceedings not inconsistent with the opinion, and did not mention security-based claims against Taggart and Cortese.

In the 1996 trial on remand, the district court after the close of evidence accepted Bakker's proposed jury instruction on the *Howey* test and the risk cap-

ital test (Tr.1422-26, 1434) that

> If the investors were attracted *primarily* by the prospect of acquiring use and not by financial returns on their investments, there is no security.

Before and during the trial, the district court refused to compel Jim Bakker to testify on matters on which he had testified in civil PTL bankruptcy proceedings and in his criminal trial (which was no longer on appeal).

The Fourth Circuit affirmed, holding that in mixed investment-use cases a fourth element must be added to both the *Howey* test and the risk capital test, ignoring this Court's one mixed investment-use decision, and holding that Bakker had not waived his privilege against self-incrimination. *Teague v. Bakker,* 139 F.3d 892 (4th Cir. 1998) (mem.).

B. STATEMENT OF FACTS

The issue before this Court is not whether Lifetime Partnerships are securities, but only whether additional requirements may be added to the *Howey* test and the risk capital test where there is a usable investment. The facts relevant to the elements of those tests are relevant to the added requirements.

The Fourth Circuit described many of the facts about PTL Lifetime Partnerships in its earlier opinion.

> [Jim Bakker] offered eleven different partnership programs ranging in cost from $500 to $10,000. Eight of the partnerships promised benefits that included annual lodging in one of the Heritage Village facilities. In January 1984, [Bakker] began using the mail to solicit lifetime partners. Also, from February 1984 through May 1987 Bakker used broadcasts carried on the

> PTL Television Network and various commercial affiliates to solicit lifetime partners. . . . [Bakker] raised at least $158 million through the sale of approximately 153,000 partnerships with lodging benefits.

Teague v. Bakker, 35 F.3d 978, 982 (4th Cir. 1994).

Bakker oversold PTL Lifetime Partnerships and diverted much to his private benefit. That resulted in both the Lifetime Partners' 1990 verdict for common law fraud for $129,000,000 and Bakker's criminal conviction. *United States v. Bakker,* 925 F.2d 728 (4th Cir. 1991). The oversales and diversions are not the basis of the securities claims.

Instead, the basis of the securities claims is Bakker's material misstatements and omissions about the profits or economic benefits of Lifetime Partnerships, which are described below.

1. Lifetime Partnerships and the Howey Test

The only element of the *Howey* test that was at issue was the "expectation of profits." Bakker conceded the other elements in his earlier appeal, 35 F.3d at 986 n.8, 987, and at trial. (Tr.39, 46.) The five categories of profit are precisely what Bakker made misstatements and omissions about, and what the 1994 opinion of the Fourth Circuit acknowledged would show a security if found by a jury (as quoted below).

The Fourth Circuit noted the five types of "expectation of profit" that Bakker promised (which are more fully documented from the record below), in discussing the *Howey* test:

a. *Commercial Hotel Profit*--"the value of the LTPs was enhanced by virtue of the commercial activities of the PTL facilities in catering to patrons paying full price" (35 F.3d at 989);
b. *Investment Value*--"the value of the privileges lifetime partners *would receive far exceeded* the $1,000 LTP purchase price" (*id.* at 987);
c. *Appreciation*--promises that a Partnership "will appreciate in value, making it of greater value than at the time of its origination" (A.609);
d. *Economic Benefit*--"economic benefit in the form of discounted lodging privileges at Heritage USA facilities" (35 F.3d at 988); and
e. *Transfer Profit*--promises of transferability "might lead partners to infer that they had a right to transfer their LTPs" (*id.* at 990).

2. Lifetime Partnerships and the Risk Capital Test

As shown from the record below (Part II), (a) Bakker called the $1,000 payment an "investment," and (b) said that it would be used in a common enterprise to build hotels, where the $1,000 was clearly at risk (Tr.792, 883-84). (c) His marketing materials promised a benefit, and even if "economic benefit in the form of discounted lodging privileges" were not profit under the *Howey* test, economic savings and usage are a sufficient benefit for risk capital test purposes.

3. Misstatements and Omissions Violating Securities Act § 12(2) and State § 12(2)

a. *Commercial Hotel Profit.* Bakker and the offering materials promised that "we need the other 50 percent to . . . run the place and keep it going. You just can't, you can't operate a hotel without an income." (Tr.971.) As the Fourth Circuit noted earlier,

It can be concluded, moreover, that PTL could

> offer this benefit by virtue of its *operation, at regular prices, of the facilities not occupied by lifetime partners*. This conclusion is supported by the fact that *at least 50% of such facilities were reserved for regular patrons* in order that "proper hotel maintenance and operations" might be maintained.

35 F.3d at 988. The promise of commercial hotel profit was repeatedly made (Tr.970-72 (4 television programs)), as was the statement that 50% of hotel rooms were reserved for "proper hotel ... operation" (A.534; *accord,* A.528, 541, 542, Tr.216, 220, 222, 226).

Thus, Lifetime Partners had to be investing with an expectation of this commercial hotel profit occurring, because there was no other way to provide them with "four free days and three free nights for your lifetime" in the PTL hotels (the entire $1,000 was to be used to build the hotels, not to keep them operating). Every Lifetime Partner who testified expected profit from the commercial hotel operation. (Tr.215, 376-77, 399, 403, 452, 454, 770, 802, 881.) The promised commercial hotel profit did not come to pass.

b. *Investment Value*. Bakker and the offering materials promised that Lifetime Partnerships were investments--and good investments at that (A.525, 542, 550; Tr.352)--as the 1994 opinion said:

> We first observe that the promotional materials circulated by PTL represented that the value of the privileges lifetime partners would receive far exceeded the $1,000 LTP purchase price. We note, in particular, that letters signed by Bakker, promoting the LTPs, state: "You cannot find a better *investment* opportu-

nity anywhere--you can actually save thousands of dollars during your lifetime with your one-time *investment* of $1,000 in the ministry of PTL." J.A. 2178 [A.550]. Further, a brochure designed to promote certain LTPs states:

> There has never been a better value for your investment in the ministry of PTL. For a one-time gift of $1,000 you will be able to stay free for 4 days and 3 nights, every year, for the rest of your life, in the Heritage Grand Hotel!
>
> Think of the thousands of dollars you will save during your lifetime!
>
> According to the current rate of inflation, if you use your PTL Lifetime Partner membership for 40 years, the gift *value of your room at the Heritage Grand Hotel could be worth almost $20,000!* You will *not be able to find a better investment opportunity anywhere!*

J.A. 2185E [A.525] (footnote omitted[10]).

[10]The footnote further emphasizes the economic aspect of the LTPs, stating

> Based on estimated room rates and the average rate of inflation, the equivalent costs for a Lifetime Partner who stays in the Heritage Grand Hotel 3 nights, every year, for 40 years, would be approximately $19,500.

35 F.3d at 987-88.

Bakker not only said the Grand Partnerships were worth "almost $20,000" (A.525), but that the Towers Partnerships were "literally worth hundreds of thousands of dollars in your lifetime" (A.543; Tr.767), and that the 1100 Club Partnerships were a "Once-In-A-Lifetime Opportunity" (A.544). Bakker said repeatedly on television that the various Lifetime Partnerships were worth $20,000-$60,000 (Tr.353, 354, 357, 365, 453, 621, 623, 625), and that the Silver 7000 Life-

time Partnerships were worth over $1,000,000 (Tr.359, 360, 361, 365, 627, 631). Every Lifetime Partner who testified said they understood and believed the statements that Lifetime Partnerships already were and would be profitable investments. (Tr.207, 212, 372, 374, 427-28, 453, 489, 559, 731, 837-38, 840, 877-78, 976.)[1] Yet the promised investment value was mistaken--Lifetime Partnerships were worth only $6,052 (A.613, 619; Tr.515, 612).

Bakker's own witness, Liacono, testified that many Lifetime Partners were "there strictly for the investment aspect." (Tr. 1116.)

c. *Appreciation*. Bakker promised that each Lifetime Partnership "will appreciate in value, making it of greater value than at the time of its origination" (A.609), in a letter mailed to all Lifetime Partners (Tr.810). He and the offering materials promised that Partnerships had already appreciated beyond their $1,000 price:

> The materials not only speak generally of the LTP's as "investment[s]," but also offer specific calculations of the true *value* of the LTPs as compared to their purchase price.
>
> . . . .
>
> As a consequence, we cannot rule out the possibility that the LTPs offered purchasers the pos-

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[1] For example, Annette Watson (Tr.427),

> Q. Why did you buy it?
>
> A. I thought that it would be a good investment based on what we were told.
>
> Q. Who were you told by?
>
> A. Well, of course, we heard Mr. Bakker on television. . . .

> sibility of realizing *capital appreciation.*

35 F.3d at 989.

Bakker repeatedly said on television that the prices were going up (Tr.862-66, 355, 356.) He said that in letters as well, such as, after the Towers memberships had long sold for $1,000, that "[t]he Memberships in the Towers are now $2,000 and will go up to $3,000 shortly." (A.568, *accord,* A.355, 356, 364, 563, 534.) The Lifetime Partners who testified took the promise of appreciation at face value (Tr.840, 212, 374, 457, 471, 838-39, 878, 976), and believed Bakker (Tr.212, 374, 471, 879). The promised appreciation did not occur.

d. *Economic Benefit.* Bakker and the offering materials promised economic benefits and "savings" --that "[y]ou will save many thousands of dollars in vacation lodging during the years ahead" (A.534, *accord,* A.525, 544)--as the Fourth Circuit noted:

> These promotional materials can be read to suggest that LTP purchasers would receive an economic benefit in the form of discounted lodging privileges at Heritage USA facilities. . . .

35 F.3d at 988.

The Lifetime Partners took these promises of profit at face value. (Tr.207, 316, 378, 397, 568, 731.) Mrs. Teague said she regarded dollar savings as profit, because if you "save a dollar, it's the same as a dollar earned." (Tr.317.) However, the promises of savings were overstated. (A.613,619.)

e. *Transfer Profit.* After most of the early

Lifetime Partnerships prohibited transfer, Bakker and PTL materials withdrew the transfer restriction and made the Lifetime Partnerships transferable. They removed the "non-transferable" language from most Lifetime Partnerships cards (A.622-23, 589, 590, 598; Tr.434, 841-45), and from most Lifetime Partnership letters (A.542, 559, 563, 570, 573, 577, 583, 586, 587, 591, 595, 596, 597, 598), after the first year (A.528, 534). Bakker could not produce any evidence of any barrier to transfer for value (Tr.769).

Bakker and PTL developed a transfer form (A.611), and sent it out in a mass mailing to all Lifetime Partners (Tr.807). They sent a letter to all prospective Lifetime Partners (Tr.832) saying that "[a] Towers Member can let anyone they personally choose, use their membership, any given year" (A.610), and that equally applied to Grand Lifetime Partners (Tr.812). As the Fourth Circuit pointed out,

> On the record before us, however, we cannot conclude that the LTPs are nontransferable. . . . First, forms, purportedly prepared by PTL, which allow for the *transfer* of LTP benefits on a yearly basis, J.A. 2626, and a letter from PTL to certain LTP holders indicating that their LTPs were in fact *transferable*, again on a yearly basis. J.A. 2629. Last, PTL records tabulate the number of LTPs *"transferred."* See J.A. 2562-72. A jury might reasonably conclude that this and other references to the increasing value of the LTPs might lead partners to infer that they had a right to *transfer* their LTPs

35 F.3d at 989-90.

Bakker's own witness testified that, in his survey,

"the majority" of Lifetime Partners understood Lifetime Partnerships to be transferable. (Tr.1114.) He noted that Bakker promised on television, "you can pass it on to your heirs." (Tr. 1101.) Most Lifetime Partners who testified said the same thing (Tr.976, 378, 392-93, 732, 838, 231, 298, 326, 776-77, 781, 882; A.622-23.). Because the trial judge correctly ruled that transferability is not a requirement of a security under the *Howey* test or otherwise, no testimony was offered about actual sales (A.051.) However, PTL honored all transfer requests after the first year (*e.g.*, Tr.231-32, 294, 300, *see* 1218), transferred "thousands" between categories (Tr.925), and made $1.4 million of transfers on PTL's books to new owners. In fact, Bakker on television referred to "selling some on the black market," and discussed a "knowledgeable business person" who bought 27 Lifetime Partnerships, evidently to sell. (Tr.365-66.) The limited market was the same as any other unlisted security.

f. *Bakker's Challenged FBI Questionnaires.* Bakker, to lay a foundation for the as-yet unadopted "primary" test, was allowed over objection to introduce FBI questionnaires of 192 out of over 150,000 Lifetime Partners (Bakker Br. at 8), which the Partners had not themselves filled in and which had not asked anything specific about profit. Bakker's own FBI witness, who coordinated the 192 questionnaires, said that many Lifetime Partners were "there strictly for the investment aspect." (Tr. 1116. *Accord,* A.393.) Several of the

192 Lifetime Partners testified, and said what was not actually asked on the questionnaire, that they invested for profit. (Tr.374-77, 399, 837-40, 427.)

g. *The $10 Billion Securities Exemption.* The resort timeshare industry totals about $4.5 billion per year,[2] and the resort condominium industry is much larger.

The Fourth Circuit held that its decision "renders the majority of the plaintiffs' other claims moot." (Slip op. at 6.) The securities ruling was the sole reason for denying those claims, and its reversal by this Court revives those other claims, and they are preserved here by reference.[3]

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[2] American Resort Development Ass'n, The Resort Timeshare Industry in the United States (1997) (study by KPMG Peat Marwick).

[3] State § 12(2) claims were wrongly excluded from the 1996 retrial (under N.C. Gen. Stat. §§ 78A-1 et seq. and S.C. Code). The Fourth Circuit had said that "we reinstate plaintiffs' securities fraud claims under federal *and state* law." 35 F.3d at 992. Those claims had been made in the complaint, preserved in the 1990 trial, excluded by the securities directed verdict, and "reinstated" by the Fourth Circuit reversal. State § 78A-8(2) claims were wrongly excluded on a negligence basis, as were gross negligence claims for securities violations by directors and officers, and claims for Lifetime Partnerships acquired by exchange during the limitations period. Other claims, such as controlling person liability and Taggart's and Cortese's liability, were argued in the 1996 appeal but not mentioned in the 1998 decision, and are preserved.

REASONS THE PETITION SHOULD BE GRANTED

I. THE FOURTH CIRCUIT SECURITIES DECISION ON THE HOWEY TEST CONFLICTS WITH OTHER CIRCUITS AND THIS COURT, BY CLAIMING TO HOLD AS A MATTER OF FIRST IMPRESSION THAT IN A MIXED INVESTMENT-USE CASE, IT IS NOT SUFFICIENT THAT A PERSON "IS LED TO EXPECT PROFITS," AND THAT AN ADDITIONAL REQUIREMENT OF THE HOWEY TEST IS THAT THERE IS NO SECURITY UNLESS THE INVESTOR PAID "PRIMARILY" FOR PROFIT AND NOT "PRIMARILY" FOR USE, IGNORING THIS COURT'S MIXED INVESTMENT-USE DECISION IN UNITED BENEFIT. (THE INVESTMENT BY PTL LIFETIME PARTNERS WAS FOR BOTH PROFIT AND USE.) THIS ADDITIONAL ELEMENT OF THE HOWEY TEST EXEMPTED FROM SECURITIES LAW PROTECTION BOTH JIM BAKKER'S SALE OF OVER $160,000,000 OF PTL LIFETIME PARTNERSHIPS TO OVER 150,000 PEOPLE, AND THE REST OF A $10 BILLION INDUSTRY.

The Fourth Circuit upheld the pivotal jury instruction, adding a fourth element to the *Howey* test:

> If the investors were attracted *primarily* by the prospect of acquiring use and not by financial returns on their investments, there is no security.

(Tr.1541-42, objected to at 1422-26, 1434). This instruction was the centerpiece of Bakker's closing argument (Tr.1465), and its text was the only chart or enlargement used in that closing argument (Tr.1465). The jury followed that instruction to find that Lifetime Partnerships were not securities. The Fourth Circuit said that "the subjective feeling of the vast majority of purchasers is very likely the feeling the seller objectively intended to produce," slip op. at 6, inferring that "vast majority" from mixed responses in 192

questionnaires and division among a dozen Lifetime Partners who testified out of over 150,000.

Yet all Lifetime Partners who testified said they were attracted by Bakker's promises of commercial hotel profits (Tr.215,376-77,399,403,452,454,770,802,881), and a valuable investment (Tr.207,372,374,427-28,453, 489,559,731,837-38,840,877-78,976), and most were attracted by promised appreciation (Tr.212,374,457,471, 838-39,840,878,976), or savings and economic benefits (Tr.207,316, 378,397,568,731). However, there was little testimony about whether these motivations were primary, or whether use was primary, because the "solely for use" test of *Forman* and *Howey* was not rejected, and this instruction was not adopted, until after the close of evidence.

The Fourth Circuit said that this Court's decisions did not resolve "mixed-nature transactions," because *Forman* involved solely usage and *Howey* involved solely investment. Slip op. at 5. It overlooked the one decision on mixed usage-investment: *United Benefit*.

As noted above, only the "expectation of profits" element of the *Howey* test was at issue; the other elements were conceded by Bakker.

Introduction

The Fourth Circuit decision, and the Tenth and Eleventh Circuit decision on which it relied, conflict with three other circuits, and conflict with this Court's only decision on mixed investment-use. The Fourth Cir-

cuit wrongfully added a fourth requirement to the *Howey* test, contrary to the *Howey, Forman,* and *Joiner* decisions.

The Sixth, Ninth, and Second Circuits disagree with the Fourth, Tenth, and Fifth Circuits in cases involving usable investments, and have found that securities protections apply if there was "an expectation of profit" and if the "sole" intent was not use. *Newmyer v. Philatelic Leasing, Ltd.*, 888 F.2d 385, 392, 393 (6th Cir. 1989), *cert. denied,* 495 U.S. 930 (1990); *SEC v. Goldfield Deep Mines Co.*, 758 F.2d 459, 463-64 & n.2 (9th Cir. 1985); *SEC v. Aqua-Sonic Products Corp.*, 687 F.2d 577, 583 (2d Cir.), *cert. denied,* 459 U.S. 1086 (1982).

The Court's only decision involving combined usage (life insurance) and investment (variable annuity) conflicts directly with the Fourth Circuit, in finding a security. *SEC v. United Benefit Life,* 387 U.S. 202 (1967) (life insurance with variable component).

This Court's test in *Howey* requires that a person "is led to expect profits"--not that the person is "primarily attracted" to profits. *Forman,* as even the Fourth Circuit quoted it in 1994, said that the test was whether "investors were attracted *solely* by the prospect of acquiring [use]"--not "primarily." 35 F.3d at 989. *Howey, Forman, Joiner,* and *United Benefit Life* all looked to the objective offering materials, and not to the subjective purchaser's intent, because otherwise "the existence of a

'security' [would] change according to each purchaser." 35 F.3d at 989 n.13.

The "primarily" for investment requirement creates a $10,000,000,000 exemption from securities law for the timeshare and resort condominium industries, and allows securities violations by Jim Bakker's $160,000,000 of sales to go unpunished so long as the promoter is slick enough to put 51% emphasis on usage and 49% emphasis on profit, or to call as witnesses the few investors whose individual purpose was less than 50% for profit.

> The statutory policy of affording broad protection to investors is not to be thwarted by unrealistic and irrelevant formulae.

SEC v. W.J. Howey Co., 328 U.S. 293, 301 (1946).

A. The Fourth Circuit Decision and Pivotal Instruction Conflict with This Court in United Benefit Life, and in the Howey Test, Forman, and Joiner.

1. Conflict with United Benefit Life. The challenged decision conflicts directly with this Court's only decision involving combined usage (life insurance) and investment (variable annuity) in *SEC v. United Benefit Life*, 387 U.S. 202, 211 (1967) (life insurance with variable component). There, the Court found a security despite the primary usage component, and divided the contract into a security component and an insurance component. *Id.* at 207,211. It followed the *Howey* test without adding a fourth requirement.

The Fourth Circuit should similarly have divided the Lifetime Partnerships into the investment component (a security) and the usage component (a nonsecurity).

It should also have found a security by the objective offer, not the subjective intent of 10 of 150,000 investors. That makes a Lifetime Partnership a security for some persons, and a nonsecurity for some.

This Court held that the objective offer governed, not the subjective investor's intent, quoting *Joiner:*

> The *test* . . . is what character the instrument is given in commerce by *the terms of the offer, the plan of distribution, and the economic inducements held out to the prospect.* . . . [I]t is not inappropriate that a promoter's offerings be judged as being what they were represented to be.

Id. at 211, quoting 320 U.S. at 352-53. Underlying these principles is the purpose of securities laws to protect investors, and the danger of undercutting that protection by a court-created exemption.

2. Conflict with the Howey Test. The *Howey* test does not hint at a "primarily" test:

> An investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person [1] invests his money [2] in a common enterprise and [3] *is led to expect profits* solely from the efforts of the promoter or a third party.

SEC v. W.J. Howey Co., 328 U.S. 293, 298-99 (1946). *See id.* at 100. *Howey*'s test is whether the offeree objectively "is led to expect profits"--not whether the offeree "is *primarily* led to expect profits," and not whether the offeree subjectively "primarily expects profits."

The challenged instruction not only is fatally erro-

neous in adding a "primarily" element, but in its focus on the subjective purposes of innumerable investors. *Howey* makes clear that the question is whether the objective offer is of profits, even if individual investors subjectively do not seek those profits:

> This conclusion is unaffected by the fact that some purchasers choose not to accept the full offer of an investment contract by declining to enter into a service contract with the respondents. The Securities Act prohibits the offer as well as the sale of unregistered, non-exempt securities. Hence, it is enough that the respon dents merely offer . . . .

Id. at 300-01.

3. Conflict with Forman. The *Forman* decision similarly does not give a "primarily" test, even though the stock was usable (housing), and the Fourth Circuit did not interpret *Forman* to resolve the issue:

> In short, the inducement to purchase was *solely* to acquire subsidized low-cost living space; it was not to invest for profit.
>
> In the present case there can be no doubt that investors were attracted *solely* by the prospect of acquiring a place to live, and not by financial returns on their investments.

United Housing Foundation v. Forman, 421 U.S. 837, 851, 853 (1975), quoted in *Teague v. Bakker,* 35 F.3d at 987. That decision acknowledged that sufficient commercial rental income, like that from 50% of PTL's hotels, could have met the *Howey* test, even where the primary purpose was inexpensive housing: "net income from the leasing of commercial and professional facilities is the kind of profit traditionally associat-

ed with a security investment." *Id.* at 856.

The challenged instruction was nominally based on *Forman,* but conflicts with it:

Challenged Instruction	*Forman*
If the investors were attracted *primarily* by the prospect of acquiring use and not by financial returns on their investments, there is no security.	[W]hen a purchaser is motivated by a desire to use or consume the item purchased . . . the securities laws do not apply. See also *Joiner, supra.* In the present case there can be no doubt that investors were attracted *solely* by the prospect of acquiring a place to live, and not by financial returns on their investments.

421 U.S. at 852-53. *Forman* is clear in context that "when a purchaser is motivated" means the same thing as the phrase in the next sentence--when "investors were attracted solely"--a solely standard.

And purchaser motivation is clearly determined by the objective offering materials, not the subjective intent of all or some buyers:

> Nowhere does *the Bulletin* seek to attract investors by the prospect of profits resulting from the efforts of the promoters or third parties. . . .
> In short, neither of the kinds of profits traditionally associated with securities was *offered* to respondents.

Id. at 854.

4. Conflict with Joiner. This Court similarly found that economic inducements would need to be "omitted," not "made primary," to avoid securities status:

> Had the offer mailed by defendants omitted the economic inducements of the proposed and prom-

> ised exploration well, it would have been a quite different proposition.

SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 353 (1943). *Forman* cited that approvingly, and found, "This distinction was critical." 421 U.S. at 853 nn.17-18. The *Joiner* test was quoted above.

B. The Fourth Circuit Decision and Pivotal Instruction Conflict with the Sixth, Ninth, and Second Circuits.

1. Conflict with Sixth Circuit. The Sixth Circuit used a solely test and rejected a primarily test, in a case involving interests in stamp printing plates. The violators argued that there was a primary non-profit expectation ("Although the plaintiffs in the case at bar were attracted in part by the expectation of substantial tax advantages"), and that *Forman* should be read the way Bakker reads it. The Sixth Circuit instead used the solely for use test and an "any thought of capital appreciation or earnings" test:

> In *Forman*, there could be "no doubt that investors were attracted *solely* by the prospect of acquiring a place to live, and not financial returns on their investments." *Id.* at 853, 95 S.Ct. at 2062. If the plaintiffs in the instant cases had leased stamp masters *solely* for the purpose of producing stamps for their own pleasure, *without any thought* of capital appreciation or earnings from stamp sales, *Forman* makes it clear that the securi ties laws could have no application here. . . .

Newmyer v. Philatelic Leasing, Ltd., 888 F.2d 385, 392, 393 (6th Cir. 1989), *cert. denied*, 495 U.S. 930 (1990).

2. Conflict with Ninth Circuit. The Ninth Circuit also rejected a "primarily" test, found "an" expectation of profit sufficient as *Howey* says, and read *Forman* to give a "solely" for use exception:

> Appellants argue that since the ore purchase program was promoted *primarily* for the tax benefits [which under *Forman* are not profit] which would accrue as a result of anticipated initial losses, there existed no expectation of profits. . . .[2]
>
> 2. We note that appellant's reliance on *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837 (1975) is misplaced. . . . The Court concluded that since investors were attracted *solely* by the prospect of acquiring a place to live and not by financial returns on their investments, the interests could not be properly characterized as investment contracts. . . . However, where, as here, the evidence supports a finding of *an* expectation of profit independent of anticipated initial tax benefits, we do not view *Forman* as controlling.

SEC v. Goldfield Deep Mines Co., 758 F.2d 459, 463-64 & n.2 (9th Cir. 1985).

3. Conflict with Second Circuit. The Second Circuit similarly found the expectation of profit requirement met even though an investment "was promoted *largely* for the tax advantages it offered" (which under *Forman* are not profit). *SEC v. Aqua-Sonic Products Corp.*, 687 F.2d 577, 583 (2d Cir.), *cert. denied*, 459 U.S. 1086 (1982).

4. Conflict with Fifth Circuit. The Fifth Circuit held that condominium campsites, which could be used but were marketed with an expectation of profits, were securities. *Cameron v. Outdoor Resorts of Ameri-*

ca, Inc., 608 F.2d 187, 193 (5th Cir. 1979), *aff'd on rehearing*, 611 F.2d 105 (5th Cir. 1980).

However, the Eleventh Circuit gave a primarily test in *Rice v. Braniger Organization, Inc.*, 922 F.2d 788 (11th Cir. 1991), which the Fourth Circuit followed in its 1998 opinion, noting that Justice Powell wrote the opinion. Yet the Fourth Circuit's 1994 opinion had distinguished *Rice*, 35 F.3d at 989 n.13, because *Rice* noted that courts must "look[] to the emphasis provided in the promotional material," and that the promotional materials there "do not emphasize the investment value of the lots" and had among them "only one passing reference to buying the property as an investment." *Id.* at 791.

The court below also cited the Tenth Circuit decision in *Aldrich v. McCulloch Properties, Inc.*, 627 F.2d 1036, 1039 (10th Cir. 1980). While holding that sales of residential lots were securities when, although they could be used, they were marketed "by promising the lots would increase in value because of defendants' activities in developing and providing amenities," the Tenth Circuit also said that the lots would not be securities if purchased "primarily for residential purposes." *Id.* at 1040.

5. Conflict with SEC. The Fourth Circuit decision also conflicts with the SEC regulations on resort condominiums that this Court favorably cited in *Forman*. 421 U.S. at 853 n.17. Those regulations state that a resort condominium that is intended to be

used, and is used, is still a security if there is any "emphasis on economic benefits"--not if there is a "primary" emphasis. SEC Release No. 5347, 17 C.F.R. § 231.5347 (1973). Such resort condominiums or timeshares are securities even if the purchaser declines the rental offer because he lacks any profit intent and has only usage intent. The SEC test is based on the "offer," not on the buyer's subjective intent. Various SEC rulings find resort condominiums or timeshares to be securities.

6. Conflict with Prior Fourth Circuit Decision. The Fourth Circuit's 1998 "primarily" test also conflicts with its own 1994 decision, where it found that even a "central motivation" for use and not for profit "cannot be dispositive," or mean that "there is no security". *Id.* at 988. Instead, the Fourth Circuit found that only an attraction "solely" for use would disqualify Lifetime Partnerships from being securities. *Id.* at 989. It distinguished *Rice* because "the promotional materials circulated by PTL" would have "to have focused their emphasis clearly away from the profit aspects of the LTPs" to avoid securities treatment. *Id.* at 989 & n.13. The Fourth Circuit found the marketing materials dispositive, not the investors' subjective intents. *Id.* at 988. Otherwise, "the existence of a 'security' [would] change according to each purchaser." *Id.* at 989 n.12.

Numerous decisions treat resort condominiums and timeshares as securities, if marketing materials con-

tain economic inducements.

The Fourth Circuit has created a gaping hole in securities law--$10 billion per year of its investor protections--that every boiler room solicitor welcomes. Its decision relieves Jim Bakker of liability for selling over $160 million of PTL Lifetime Partnerships despite promises of commercial hotel profit, immediate value, capital appreciation, economic benefit, and transfer profit. The 150,000 victims need protection.

II. THE FOURTH CIRCUIT SECURITIES DECISION ON THE RISK CAPITAL TEST CONFLICTS WITH OTHER CIRCUITS, BY HOLDING AS A MATTER OF FIRST IMPRESSION THAT IT IS NOT ENOUGH TO MEET THE USUAL ELEMENTS OF THAT TEST, AND THAT WHERE AN INVESTMENT BY PTL LIFETIME PARTNERS WAS FOR BOTH PROFIT AND USE (AS IS TYPICAL OF RISK CAPITAL CASES), AN ADDITIONAL REQUIREMENT OF THE RISK CAPITAL TEST IS THAT THERE IS NO SECURITY UNLESS THE INVESTMENT WAS "PRIMARILY" FOR PROFIT AND NOT "PRIMARILY" FOR USE.

Introduction

The risk capital test for a security (Tr.1543) was given immediately after the challenged instruction (Tr.1541-43), and a fourth element was added to the risk capital test by that challenged instruction.

The added element for the risk capital test conflicts with the Sixth, Ninth, and Eighth Circuits, which have adopted that test and made it "clear that the benefit can be nonmonetary" under the test. J.Long, *Blue Sky Law* § 2.04[3] (1991). This Court has nev-

er ruled on the risk capital test.

A. Definition of the Risk Capital Test.

The risk capital test is defined as follows:

> The test itself is generally considered to have three elements: (1) an investment, (2) in the risk capital of an enterprise, and (3) the expectation of a benefit. . . . Here, it is clear
>
> that the benefit can be nonmonetary. . ..

J.Long, *Blue Sky Law* § 2.04[3] (1991). The test is an alternative to the *Howey* element requiring an expectation of profits (the only *Howey* element that Bakker does not concede is met).

B. Conflict with the Ninth, Sixth, and Eighth Circuits.

The Ninth, Sixth, and Eighth Circuits have adopted the risk capital test, though this Court has not done so yet.[4] *E.g., El Khadem v. Equity Securities Corp.,* 494 F.2d 1224, 1229-30 (9th Cir.), *cert. denied,* 92 S.Ct. 183 (1974); *Union Planters National Bank v. Commercial Credit Business Loans, Inc.,* 651 F.2d 1174, 1181-82 (6th Cir. 1981), *cert. denied,* 454 U.S. 1124 (1982); *Tanenbaum v. AgriCapital,*

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[4] "Although the Supreme Court rejected the `risk capital' approach for notes," the "Ninth Circuit [still] uses this `risk capital' approach to interpret the test developed by the Supreme Court in *SEC v. W.J. Howey Co.*"--it remains viable for "investment contracts." *E.g., First Citizens Federal Savings & Loan Ass'n v. Worthen Bank & Trust Co.,* 919 F.2d 510, 516 n.6 (9th Cir. 1990).

Inc., 885 F.2d 464 (8th Cir. 1989).[5]

Those circuits have never added the requirement to the risk capital test of a "primary" expectation of benefit or profit, and clearly would have found PTL Lifetime Partnerships to be securities under the test.

Lifetime Partnerships clearly are securities under the risk capital test. They were marketed (1) as an "investment" of $1,000, (2) in the capital to build PTL hotels, and (3) with the expectation of a benefit consisting of profits and usage. The "expectation of a benefit" was not merely the economic benefit of cost savings and use, which is sufficient for the risk capital test, but profits from commercial operation of "50%" of the hotel, promised profits from immediate "value" of $20,000-$60,000, promised "appreciation" in value, and (after the first year) profit from transfer without restriction.

III. THE FOURTH CIRCUIT SELF-INCRIMINATION DECISION CONFLICTS WITH THE DISTRICT OF COLUMBIA AND EIGHTH CIRCUITS AND THIS COURT, THOUGH AGREEING WITH OTHER CIRCUITS THAT WAIVERS ARE LIMITED TO THE PARTICULAR PROCEEDING, BY HOLDING THAT A CONVICTED CRIMINAL (JIM BAKKER) HAD NOT WAIVED AND COULD CLAIM THE PRIVILEGE AGAINST SELF-INCRIMINATION IN A CIVIL SECURITIES TRIAL ON MATTERS ABOUT WHICH HE TESTIFIED AT HIS PRIOR CRIMINAL TRIAL AND IN PTL'S BANKRUPTCY PROCEEDINGS.

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[5] When the state § 12(2) claims are treated as "reinstated" (Section II *supra*), they will come under the North Carolina risk capital test, 18 N.C. Admin. Code § 06.1104(h)(2).

Introduction

The Fourth Circuit, upholding Bakker's refusal to testify under the Fifth Amendment, did not mention the Lifetime Partners' primary argument: Bakker had waived his Fifth Amendment privilege. (Slip op. at 6.)

The exclusion of Jim Bakker's testimony, as the key witness, about matters that he had addressed in testimony twice before conflicted with the District of Columbia Circuit and Eighth Circuit, which would find a waiver, although it was consistent with the other circuits that limit a waiver only to the particular proceeding. It also conflicted with this Court's decision in *Harrison v. United States,* 392 U.S. 219, 222 (1968), and also did not meet the standard that further incrimination is only a "remote and speculative possibilit[y]." *Zicarelli v. Investigation Commission,* 406 U.S. 472, 478 (1972).

A. Bakker Testified on the Same Matters in His Criminal Trial and PTL's Bankruptcy Proceedings, Before His Criminal Conviction, and His Attorneys Actually Argued at Trial that He Acted Criminally and Fraudulently.

Bakker testified voluntarily on the same issues at his criminal trial. (R. Doc.888, Appendix 3, excerpts in Tr.656-729). He also testified voluntarily on these issues in a deposition in the PTL bankruptcy proceeding. *Benton v. Bakker*, 92 B.R. 1000 (D.S.C. Bkry. 1988), *aff'd*, No. 0:89-81-16 (D.S.C. Oct.26, 1990), *aff'd*, 944 F.2d 901-02 (4th Cir. 1991) (A.).

Bakker was convicted of crimes in selling PTL Life-

time Partnerships. The U.S. Attorney acknowledged in writing, before Bakker's deposition, that there was no interest in prosecuting him, and all federal statutes of limitation had run.

Bakker's attorneys argued at the 1996 trial that he acted criminally and fraudulently. (*E.g.*, Tr.184, 153, 161.)

Yet the trial court refused to compel the key witness, Jim Bakker, to testify. (A.194-96.) Bakker, in his deposition before the 1996 trial, refused to answer virtually all questions, pleading the Fifth Amendment privilege 126 times.

B. The Circuits Are Divided About Whether a Waiver of the Fifth Amendment Privilege in One Proceeding Also Applies to a Later Proceeding.

The Fourth Circuit must have accepted the majority rule, that "[t]he waiver involved is limited to the particular proceeding in which the witness volunteers the testimony or the accused takes the stand." 8 *Wigmore on Evidence* § 2776(4), at 470 (1961). *Accord, United States v. Gary, 74 F.3d 304, 312 (1st Cir. 1996); United States v. Smith,* 940 F.2d 710 (1st Cir. 1991); *In re Hitchings,* 850 F.2d 180 (4th Cir. 1982); *In re Neff,* 206 F.2d 149 (3d Cir. 1953).

However, the District of Columbia Circuit has rejected this rule:

> In our view a witness who voluntarily testifies before a grand jury without invoking the privilege against self-incrimination, of which he has been advised, waives the privilege and may not thereafter claim it when he is called to

testify as a witness at the trial on the indictment returned by the grand jury, where the witness is not the defendant or under indictment.

While the prevailing rule is that a waiver of Fifth Amendment privilege at one proceeding does not carry through to another proceeding, there appears to be no controlling authority in this circuit. We think that rule unsound, at least for the cirumstance before us, and decline to adopt it.

. . . .

Once a witness has voluntarily spoken out, we do not see how his protected interest is jeopardized by testifying in a subsequent proceeding, provided he is not required to disclose matters of substance which are unknown to the Government. . . .

. . . .

The community's interest in law enforcement is a fundamental basic concern of our country . . . These protections are not to be extended by "mechanical rules" that serve no meaningful freedom, but interfere with and hamper sound law enforcement.

. . . .

We think the better rule is to hold that the waiver carries through unless there is new material, or possibly new conditions, that may give rise to further incrimination. . . .

Ellis v. United States, 416 F.2d 791, 800-05 (D.C. Cir. 1969).

That Circuit followed the Model Code of Evidence of the American Law Institute, and the Restatement. *Id.* at 801 & n.26.

The Eighth Circuit concurred with the District of Columbia Circuit, in *Walker v. Lockhart,* 763 F.2d 942 (8th Cir.), *cert.denied,* 106 S.Ct. 3332 (1985).

This Court has acknowledged a principle that is not

logically limited to the particular proceeding:

> A defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives . . . .

Harrison v. United States, 392 U.S. 219, 222 (1968). While that case involved reading the transcript of the former testimony rather than compulsion of further testimony, the principle supports and requires both. That is particularly true when the defendant, such as Bakker, has already been convicted:

> The ordinary rule is that once a person is convicted of a crime, he no longer has the privilege against self-incrimination as he can no longer be incriminated by his testimony about said crime.

Reina v. United States, 364 U.S. 507 (1960).

It is difficult to imagine how it could be self-incrimination for Bakker to give the same answers that he already gave voluntarily, and that to some extent can be read from earlier transcripts.

CONCLUSION

We request that the case be remanded for retrial on securities issues, holding that (I-II) the Fourth Circuit ruling and the pivotal jury instruction requiring a "primary" profit motivation were unwarranted additions to the *Howey* test and to the risk capital test, and (III) failure to compel testimony by Bakker as the key securities witness was unwarranted because his waiver of the Fifth Amendment privilege extended beyond the prior proceeding to the same subject matter in this proceeding.

Dated June 30, 1998 and respectfully submitted,

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FOURTH CIRCUIT OPINION (1998)

U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

NO. 96-2186

139 F.3d 892 (4th Cir. 1998) (Table)

(Decided Apr. 8, 1998)

[1] Before RUSSELL [FN*] and NIEMEYER, Circuit Judges, and HALL, Senior Circuit Judge.

PER CURIAM:

In this case involving the sale of lodging benefits in a vacation park, the district court instructed the jury that"[i]f the investors were **[3]** attracted primarily by the prospect of acquiring use and not [by] financial returns on their investment there is no security." The jury found that the real estate interest in question was not a security as defined under federal securities law. We must decide whether this portion of the jury instructions, in conjunction with the entire jury charge, adequately stated the controlling law. Concluding that it does, and that there is no other reversible error, we affirm.

I.

We discussed the facts and procedural history of this case at length in Teague v. Bakker, 35 F.3d 978, 981-985 (4th Cir.1994) ("Teague I "), cert. denied, 513 U.S. 1153, 115 S.Ct. 1107, 130 L.Ed.2d 1073 (1995), and we refer the reader to that opinion for any details missing here. In sum, the plaintiffs are members of a class of approximately 160,000 individuals who pur-

chased "Lifetime Partnerships" from the television evangelist James O. Bakker and his PTL ministry. The partnerships ostensibly provided partners with short-term annual lodging at the "Heritage Village" vacation park, an addition to the "Heritage USA" religious theme park in South Carolina. Bakker planned to finance the construction of the necessary hotels and bunkhouses through the sale of the partnerships. Although a certain percentage of the rooms would be reserved for use by partners, the remaining rooms were to be rented at market price in order to finance the maintenance and operation of the facilities. This vision proved illusory. The overwhelming majority of the partners never received the lodging benefits because Bakker wildly oversold the partnerships and failed to construct all of the promised buildings.

In late 1987, the plaintiffs filed this suit, alleging various claims against Bakker and others associated with the Lifetime Partnership scheme. Of particular relevance to this appeal, the plaintiffs sought to hold Bakker liable for federal and state securities law violations. The case was tried in 1990. Near the close of the evidence, the district court held that the partnerships were not "securities" as a matter of law. Accordingly, the district court dismissed the plaintiffs' securities law claims. The jury eventually found Bakker liable for common law fraud, however, resulting in a judgment of $129 million in damages.

Both Bakker and the plaintiffs appealed various is-

sues stemming from the 1990 trial. In Teague I, we upheld the common-law fraud **[4]** judgment, but reinstated the plaintiffs' securities claims against Bakker and remanded for a retrial. 35 F.3d at 990-991, 995. At the close of the retrial, the district court instructed the jury on the "investment contract" and "risk capital" tests for determining whether an interest is a security. The jury found that the partnerships were not securities. The plaintiffs now argue that the district court erroneously instructed the jury concerning the "investment contract" test.

II.

The standard of review in this case is well established. We will not reverse a jury verdict based on alleged errors in a trial court's jury instructions if the charge, as a whole, adequately states the controlling law. Spell v. McDaniel, 824 F.2d 1380, 1395 (4th Cir.1987). [FN1]

III.

The Securities Act of 1933 and the Securities Exchange Act of 1934 define "security" to include an "investment contract." 15 U.S.C. ss 77b(a)(1),

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FN1. To our chagrin, the joint appendix does not contain a transcript of the jury charge. Though we obtained a complete transcript for ourselves, we would have been spared this annoyance had counsel paid close attention to the rules of court. See Fed. R.App. P. 30(a) ("The appellant must prepare and file an appendix to the briefs which must contain: ... (4) any ... parts of the record to which the parties wish to direct the particular attention of the court.").

787c(a)(10). The Supreme Court developed a definition of the term "investment contract" in a series of opinions spanning four decades. See SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 64 S.Ct. 120, 88 L.Ed. 88 (1943); SEC v. W.J. Howey Co., 328 U.S. 293, 66 S.Ct. 1100, 90 L.Ed. 1244 (1946); United Housing Foundation, Inc. v. Forman, 421 U.S. 837, 95 S.Ct. 2051, 44 L.Ed.2d 621 (1975); and International Brotherhood of Teamsters v. Daniel, 439 U.S. 551, 99 S.Ct. 790, 58 L.Ed.2d 808 (1979). According to the Court, an investment contract exists where there has been an investment in a common enterprise that, through the entrepreneurial or managerial efforts of others, is reasonably expected to generate profits for the investor in the form of capital appreciation or participation in earnings. Daniel, 439 U.S. at 558-61; Forman, 421 U.S. at 852-53; Howey, 328 U.S. at 298-99. **[5]**

Plaintiffs contend that the partnerships are "investment contracts" under this law. The district court instructed the jury that "[i]f the investors were attracted primarily by the prospect of acquiring use and not [by] financial returns on their investment there is no security." The plaintiffs argue that the word "primarily" should have been replaced with the word "solely" in order to bring the charge into conformity with the Supreme Court's holding in Forman.

Forman announced the rule that transactions solely for use are not securities as a matter of law. On the other side of the spectrum, in Howey, the Supreme Court

held that transactions solely for profit are securities as a matter of law. In Teague I, we recognized that mixed nature transactions should be submitted to the jury for a determination. Thus, the problem confronting the district court was how to convert this assessment into a practical legal test for the jury.

The district court's solution, to instruct the jury that "[i]f the investors were attracted primarily by the prospect of acquiring use and not [by] financial returns on their investment there is no security," is supported by common sense and by persuasive precedent from other federal circuit courts. In Rice v. Braniger Organization, Inc., 922 F.2d 788 (11th Cir.1991), a case involving the sale of equity memberships in real estate, Retired Justice Powell interpreted his own Forman decision. Justice Powell concluded that the "United States Supreme Court has held that where those who purchase something with the primary desire to use or consume it, the security laws do not apply." [FN2]Id. at 790 (emphasis added). The Rice opinion went on to examine both promotional materials offered by the sellers and the motivations of the purchasers.

FN2. In Teague I we distinguished Rice on its facts, but did not disavow Justice Powell's reading of his earlier Supreme Court opinion. 35 F.3d at 989 n. 13. It is also worth noting that in Daniel, where the Supreme Court held that an employee's interest in a noncontributory, compulsory pension plan is not a security, the Court asserted that the "employee is selling his labor primarily to obtain a livelihood, not making an investment." 439 U.S. at 560.

Id. Similarly, in Aldrich v. McCulloch Properties, Inc., 627 F.2d 1036 (10th Cir.1980), the court held that the subdivided real estate lots purchased by the plaintiffs were "not securities if the purchasers were induced to obtain them *primarily* for residential **[6]** purposes--'to occupy the land or develop it themselves.' " Id. at 1040 (quoting Howey, 328 U.S. at 300.)

Plaintiffs also attack the instruction because it is stated in terms of the purchasers' subjective motivations. There is a small kernel of merit in plaintiffs' argument, but not enough to upset this verdict. The subjective intention of a given purchaser cannot control whether something is a "security," else some might have purchased securities while others did not. The proper focuses of the inquiry are on the transaction itself and the manner in which it is offered. On the other hand, where most intended purchasers share a common understanding of, and have similar motives stoked by, an offering, the "subjective" understanding and motives are powerful evidence of the objective intent and effect of the offering. In other words, the subjective feeling of the vast majority of purchasers is very likely the feeling the seller objectively intended to produce.

The test for the adequacy of a jury instruction"is not one of technical accuracy in every detail." Spell, 824 F.2d at 1395. Taken as a whole, the jury charge adequately conveyed to the jury that it was to deter-

mine whether consumption or investment was the dominant theme of the transaction.

IV.

Our decision renders the majority of the plaintiffs' other claims moot. One issue does bear brief mention, however. Bakker refused to answer questions about the alleged securities fraud, citing his Fifth Amendment right against self-incrimination. Plaintiffs requested that the district court compel Bakker to testify; the court declined. On appeal, plaintiffs assert that the possibility of Bakker's facing additional charges is and was so remote that his right against self-incrimination would not have been abridged by compelled testimony. See Zicarelli v. New Jersey Commission of Investigation, 406 U.S. 472, 92 S.Ct. 1670, 32 L.Ed.2d 234 (1972).

Unlike in Zicarelli, where the questions posed (involving crimes in New Jersey) could not have led to the foreign prosecution the defendant supposedly feared, Bakker would have taken a palpable risk had he testified. It may well be that there is little current likelihood of [7] prosecution; on the other hand, the unlikeliness is the result of prosecutorial discretion, and new information could always reignite interest. Bakker has the right to refuse to provide the kindling. [FN3]

Accordingly, we affirm the judgment of the district court. [FN4]

AFFIRMED

FN3. Plaintiffs also argue that the lapse of time since the events in question would protect Bakker. We disagree. The Sixth Amendment's guarantee of a speedy trial attaches only when an individual becomes an "accused." It has no application to preindictment delays. United States v. Marion, 404 U.S. 307, 313, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971).

FN4. Appellants' motion to strike portions of Bakker's brief is denied.

FN* Judge Russell participated in the hearing of this case at oral argument but died prior to the time the decision was filed. The decision is filed by a quorum of the panel. See 28 U.S.C.A. s 46(d) (West 1993).

RELEVANT PART OF EARLIER FOURTH CIRCUIT OPINION (1998)

U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT
NOS. 91-2101, 91-2120 TO 91-2122
35 F.3d 978 (4th Cir. 1994)
(Decided Sept. 23, 1994)

[985] III.

We consider first the district court's grant of a directed verdict against plaintiffs as to their securities fraud claim. Plaintiffs urge that the LTPs constituted "securities" within the meaning of the securities acts, and that, as a consequence, the use of fraud in the sale of the LTPs contravened Section 10(b) of the federal Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5, as well as the antifraud provision of the North Carolina Securities Act, N.C.Gen.Stat. § 78A-8.

The district court explained its reasons for granting defendants' motion for a directed verdict thus:

> In *United Housing Foundation v. Forman*, 421 U.S. 837, 95 S.Ct. 2051, 44 L.Ed.2d 621 (1975), the United States Supreme Court held that "when a purchaser is motivated by a desire to use or consume the item purchased ... the securities laws do not apply." *Id.* at 852-53 [95 S.Ct. at 2060-61] (footnote and citation omitted). **[986]** Under *Forman*, the lifetime partnerships at issue in this case are not securities as a matter of law.

J.A. 1799. The district court cited no facts in support of its conclusion.

"Security," for purposes of federal securities regulation, is defined in Section 2(1) of the Securities Act of 1933, 15 U.S.C. § 77b(1), and in Section 3(10) of the Securities Exchange Act of 1934, 15 U.S.C. § 78c(10). [1] Among the several definitions provided in both sections, securities are defined to encompass "investment contracts." Plaintiffs allege that the LTPs constitute "investment contracts."

The determination of whether a placement of money constitutes an "investment contract" calls for examining the facts under the test enunciated in *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298-99, 66 S.Ct. 1100, 1103, 90 L.Ed. 1244 (1946). The *Howey* test instructs that an investment contract exists where there has been (i) an investment of money (ii) in a common enterprise (iii) with an expectation of profits garnered "solely" from the efforts of others. [2] At

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[1] These two sections differ only slightly as far as wording and are generally accepted to be indistinguishable. *E.g., Landreth Timber Co. v. Landreth*, 471 U.S. 681, 686 n. 1, 105 S.Ct. 2297, 2301 n. 1, 85 L.Ed.2d 692 (1985). For purposes of this discussion we discuss, without distinguishing, cases addressing the definition of "security" under both acts.

[2] "Despite the restrictive language of the third prong of the test,later courts have explained that a program requiring some effort from the investor may still constitute an 'investment contract,' but the most essential functions or duties must be performed by

issue here is whether the third prong, that plaintiffs made their investment with an expectation of profits solely from the efforts of others, is met. [3]

The Supreme Court considered *Howey's* third prong in the context of an offering of interests in

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others and not the investor." *Bailey v. J.W.K. Properties, Inc.*, 904 F.2d 918, 920 (4th Cir.1990).

[3]The parties do not contest that the remaining prongs of the *Howey* test can be met on the record before us. We note, in particular, that, because we find that "profits" under the LTP scheme are distributed *pro rata* to lifetime partners, there is horizontal commonality, *see Revak v. SEC Realty Corp.*, 18 F.3d 81, 87 (2d Cir.1994), in this case. This means that we need not decide here whether some form of vertical commonality, *see id.* at 87-88, might satisfy the second prong of the *Howey* test.

The fact that there is horizontal commonality here also allows us to distinguish this case from *Revak v. SEC Realty Corp.*, *supra*, and *Wals v. Fox Hills Development Corp.*, 24 F.3d 1016 (7th Cir.1994), two recent cases where the Second and Seventh Circuits, respectively, found no security arising from the sale of condominium interests because of the absence of commonality. In particular, in *Revak*, there was no rental pool arrangement; that case involved merely the sale of condominiums. For that reason, the Second Circuit found that neither horizontal commonality nor strict vertical commonality, assuming the latter adequate to satisfy *Howey*, was present. *Wals* presented the Seventh Circuit with a case in which there were rental pool arrangements. The arrangements, however, were individual contracts between each purchaser and the developer. Because there was no overarching rental pool arrangement according to which profits would be distributed *pro rata* among all purchasers, the Seventh Circuit found that horizontal commonality, which that court reads the *Howey* test to require, was not present.

real estate in *United Housing Foundation v. Forman*, 421 U.S. 837, 95 S.Ct. 2051, 44 L.Ed.2d 621 (1975). There the Court was faced with the question of "whether shares of stock entitling a purchaser to lease an apartment in ... a state subsidized and supervised nonprofit housing cooperative ... are 'securities'." *Id.* at 840, 95 S.Ct. at 2054. The Court answered this question in the negative, explaining:

> The touchstone [of the *Howey* test] is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others. By profits, the Court has meant either capital appreciation resulting from the development of the initial investment ... or a participation in earnings resulting from the use of investors' funds.... In such cases the investor is "attracted solely by the prospects of a return" on his investment. *Howey, supra*, [328 U.S.] at 300 [66 S.Ct. at 1103]. By contrast, when a purchaser is motivated by a desire to use or consume the item purchased--"to occupy the land or to develop it themselves," as the *Howey* Court put it, *ibid.*--the securities laws do not apply.

[987] *Id.* at 852-53, (citations and footnotes omitted). The Court concluded: "In the present case there can be no doubt that investors were attracted solely by the prospect of acquiring a place to live, and not by financial returns on their investments."

Id. at 853,. Reasoned the Court:

> Nowhere does the [Investment Bulletin circulated to prospective purchasers] seek to attract investors by the prospect of profits resulting from the efforts of the promoters or third parties. On the contrary, the Bulletin repeatedly emphasizes the "nonprofit" nature of the endeavor. It explains that if rental charges exceed expenses the difference will be returned as a rebate, not invested for profit. It also informs purchasers that they will be unable to resell their apartments at a profit since the apartment must first be offered back to [the corporation owning the complex] "at the price ... paid for it." [App. 163a.] In short, neither of the kinds of profits traditionally associated with securities was offered to respondents.

421 U.S. at 854.

Forman, we think, makes clear that, for *Howey*'s third prong to be satisfied, it must be shown (1) that the opportunity provided to offerees tended to induce purchases by emphasizing the possibility of profits, (2) that the profits are offered in the form of capital appreciation or participation in earnings within the meaning of *Howey* and *Forman*, and (3) that the profits offered would be garnered from the efforts of others. We turn, then, to an examination of the facts of this case in light of the third

prong of the *Howey* test. [4] We note initial-

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[4] *Forman* does not preclude the possibility that an offering of real estate can, as a matter of law, constitute an offering of a security. *E.g.*, *Hocking v. Dubois*, 885 F.2d 1449 (9th Cir.1989) (en banc), *cert. denied*, 494 U.S. 1078, 110 S.Ct. 1805, 108 L.Ed.2d 936 (1990). Indeed, "[w]hile it is true that ordinary real estate investments, e.g., the purchase of a dwelling, usually are not securities under either Federal or State law, the facts of each case determine whether or not particular instruments are securities." *Kosnoski v. Bruce*, 669 F.2d 944, 946 n. 3 (4th Cir.), *cert. denied*, 459 U.S. 832, 103 S.Ct. 72, 74 L.Ed.2d 71 (1982).

We think that the same can be said of the offering of a timeshare. *See* Thomas Lee Hazen, *Treatise on the Law of Securities Regulation* § 1.5, at 30 (2d ed.1990) ("the currently fashionable marketing of real estate interests through time-share or shared equity programs raises securities law issues because of the possibility of finding an investment contract"); *cf. State v. Shade*, 104 N.M. 710, 726 P.2d 864, 869-71 (Ct.App. 1986) (finding that timeshares can be securities under New Mexico securities law which employs the *Howey* test), *writ quashed sub nom. Vincent v. State*, 104 N.M. 702, 726 P.2d 856 (1986), *overruled on unrelated grounds, State v. Olguin*, --- N.M. ----, 879 P.2d 92 (Ct.App. 1994), *cert. granted*, — N.M. —, 879 P.2d 91 (1994). (Our use of the term "timeshares" to describe the LTPs at issue here in no way reflects upon the question of whether they qualify as "vacation time sharing plans" as that term is used in the SCTSA. Indeed, we conclude below tha the LTPs are not subject to regulation under the SCTSA. *See post*, at 992-94.)

The district court therefore erred in failing to consider the specific facts presented before granting the appellees' motion for a directed verdict. "An action [under the securities laws] should not be dismissed without an exploration of [the promotional] materials where ... the plaintiffs reasonably allege

ly that the third element delineated above, that is, that the profits offered are garnered from the efforts of others, is not at issue here, *i.e.*, appellees do not dispute that, if there are profits here within the meaning of *Howey* and *Forman* and if offerees would reasonably have been induced to purchase LTPs based upon promises of profit, *Howey*'s third prong is met. We therefore need only consider the first two elements delineated above.

We first observe that the promotional materials circulated by PTL represented that the value of the privileges lifetime partners would receive far exceeded the $1,000 LTP purchase price. We note, in particular, that letters signed by Bakker, promoting the LTPs, state: "You cannot find a better investment opportunity anywhere--you can actually save thousands of dollars during your lifetime with your one-time investment of $1,000 in the ministry of PTL." J.A. 2178. Further, a brochure designed to promote certain LTPs states:

> **[988]** There has never been a better value for your investment in the ministry of PTL. For a one-time gift of $1,000 you will be able to stay free for 4 days and 3 nights, every year, for the rest of your life, in the Heritage Grand Hotel!
>
> Think of the thousands of dollars you will save

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the existence of investment intent and common enterprise and where nothing in the complaint precludes the finding of a security." *Aldrich v. McCulloch Properties, Inc.*, 627 F.2d 1036, 1040 (10th Cir.1980).

during your lifetime!

> According to the current rate of inflation, if you use your PTL Lifetime Partner membership for 40 years, the gift value of your room at the Heritage Grand Hotel could be worth almost $20,000! You will not be able to find a better investment opportunity anywhere!

J.A. 2185E (footnote omitted[5]). Later in the same brochure, it is cautioned: "A maximum of 50% of Heritage Grand Hotel rooms will be available at any given time for Lifetime Partners, allowing for proper hotel maintenance and operations." J.A. 2185H. Other brochures contain similar representations, and Bakker made similar representations on his television program.[6]

These promotional materials can be read to suggest

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[5]The footnote further emphasizes the economic aspect of the LTPs, stating:

> Based on estimated room rates and the average rate of inflation, the equivalent costs for a Lifetime Partner who stays in the Heritage Grand Hotel 3 nights, every year, for 40 years, would be approximately $19,500.

J.A. 2185E n.*.

[6]For example, on a January 22, 1986, broadcast, Bakker explained:

> Do you know, when somebody found out I was offering $1,000 for seven days and six nights every year, do you know what they [sic] said? You couldn't rent that suite for $1,000 a night for one night, is what it would rent for in a good hotel. So, that means, it is worth $7,000 or $6,000 just for the first week you stay in it.

Tr. 2814.

that LTP purchasers would receive an economic benefit in the form of discounted lodging privileges at Heritage USA facilities. It can be concluded, moreover, that PTL could offer this benefit by virtue of its operation, at regular prices, of the facilities not occupied by lifetime partners. This conclusion is supported by the fact that at least 50% of such facilities were reserved for regular patrons in order that "proper hotel maintenance and operations" might be maintained.

Appellees urge that members of the plaintiff class who testified at trial indicated that, despite the foregoing statements in the materials promoting the LTPs, they purchased LTPs with personal use, not profit, as the central motivation. However, even granting appellees' characterization of the testimony of these witnesses, such testimony simply cannot be dispositive in the face of evidence that the promoter of the scheme in question marketed the scheme by emphasizing the potential for profit. Indeed, the Court in *Forman* focused not on the testimony of purchasers of cooperative apartments, but on whether the marketing approach adopted by the sellers was likely to induce purchasers interested in turning a profit.[7] 421 U.S. at

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[7] It would make little sense for the existence of a "security" to turn solely on whether those who actually invest do so without regard to profit. Such a rule would be highly impractical. Would the existence of a "security" change according to each purchaser? If not, how many, or what percentage of, purchasers would have to have made their investments with an eye toward

[989] 853-58, 95 S.Ct. at 2061-63; *see Rice v. Branigar Org., Inc.*, 922 F.2d 788, 790 (11th Cir.1991)[8] ("In addition to looking at the

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profits in order for there to be "securities"? Finally, how could the SEC be expected to regulate effectively where the existence of a "security" turns not on how and to whom an investment opportunity is offered, but only on those who ultimately undertake such an investment?

We note that such a rule seems inconsistent with the Supreme Court's holding in *SEC v. Ralston Purina Co.*, 346 U.S. 119, 73 S.Ct. 981, 97 L.Ed. 1494 (1953). There, the Court was faced with the claim by Ralston Purina Co. that an offering of company stock made to its employees was exempt under what is now Section 4(2) of the Securities Act of 1933, 15 U.S.C. § 77d(2), pursuant to which "transactions by an issuer not involving any public offering" are exempt from regulation. Held the Court: "The focus of inquiry [as to whether an offering is public] should be on the need of the *offerees* for the protections afforded by registration." *Id.* at 127, 73 S.Ct. at 985 (emphasis added). The Court concluded that Ralston Purina Co. could not demonstrate that all the employees to whom it had offered stock had access to enough information about the company that it could be concluded that they were not in need of "the protections afforded by registration." Importantly, the Court did *not* look solely to those employees who, in fact, accepted the offer and purchased stock. This holding seems inconsistent with appellees' position: adoption of a test for the existence of a 'security' which looked only to actual purchasers would seem to undermine the Supreme Court's holding in *Ralston Purina Co.*

[8] Appellees rely heavily upon the Eleventh Circuit's decision in *Rice*. There, Justice Powell, writing for the court, held that sales of lots in a residential housing development were not sales of "securities." Appellees make particular reference to

motivations of the purchasers, the Supreme Court also has looked to the emphasis provided in the promotional material to determine whether the sale of something is

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the following statement by the court in *Rice*:

> We believe that people buy houses and lots in a beach-club development primarily to use them, not to derive profits from the entrepreneurial efforts of the developers.... The appellants have not offered any evidence to show that the majority or even a fair number of the buyers bought houses or lots as an investment.

922 F.2d at 790-91 (citation omitted). Appellees argue that, here, appellants have similarly failed to provide evidence that any class members purchased LTPs as investments.

Appellees' argument ignores the Eleventh Circuit's observation (one that, as noted in the text, we share) that, "[i]n addition to looking at the motivations of the purchasers, the Supreme Court also has looked to the emphasis provided in the promotional material to determine whether the sale of something is a sale of 'securities' for the purpose of federal securities law." 922 F.2d at 790. On this basis, the Eleventh Circuit relied, in support of its holding that no security was present, upon the fact that, in the case before it,

> the promotional materials published to sell the lots at the Landings do not emphasize the investment value of the lots. Of the several marketing items introduced into evidence, there was only one passing reference to buying the property as an investment. The overall emphasis in the promotional material was clearly placed on enjoying the beauty of the island and the amenities of the club and community.

922 F.2d at 791 (citations omitted). The same cannot be said here. As described above, the promotional materials circulated by PTL cannot be said to have focused their emphasis clearly away from the profit aspects of the LTPs. We conclude that *Rice* is factually distinguishable from the case at bar.

a sale of 'securities' for the purpose of federal securities law."); *Aldrich v. McCulloch Properties, Inc.*, 627 F.2d 1036, 1039-40 (10th Cir.1980) ("Promotional materials, merchandising approaches, oral assurances and contractual agreements were considered in testing the nature of the product in virtually every relevant investment contract case."). In short, "[i]n the present case," we *can and do doubt* whether "investors were attracted solely by the prospect of acquiring a [hotel room to use], and not by financial returns on their investments." *Forman*, 421 U.S. at 853, 95 S.Ct. at 2061.

We conclude, then, that the promotional materials used to market the LTPs can be seen as emphasizing the profit potential of the LTPs. The materials not only speak generally of the LTPs as "investment[s]," but also offer specific calculations of the true value of the LTPs as compared to their purchase price. The materials also allow the reader to infer that the value of the LTPs was enhanced by virtue of the commercial activities of the PTL facilities in catering to patrons paying full price. Moreover, it is clear and, as noted above, undisputed, that this benefit arises from the managerial efforts of others.

For *Howey*'s third prong to be satisfied, the benefit available to lifetime partners must arise either as capital appreciation or as participation in earnings. We believe that the record before us allows for the conclusion that the benefit in this case arises

as capital appreciation. Under the LTP scheme, it seems that the value of the rights to use the various Heritage, USA, facilities would be enhanced, and therefore capital appreciation might accrue, by virtue of the regular commercial operations of half of all the facilities reserved by regular patrons paying full price for their accommodations.

Appellees argue that the LTPs are nontransferable and that, as a consequence, lifetime partners could never realize any capital appreciation that the LTPs might accrue. On the record before us, however, we cannot conclude that the LTPs are nontransferable. Appellees first note that several class members testified that they were unaware that LTPs could be transferred or believed that they could not be. As discussed below, however, testimony as to the beliefs of actual purchasers, even if accurately characterized, is not dispositive. Appellees further note that several of the LTPs offering brochures explicitly prohibit transfer of LTPs. *See*, **[990]** *e.g.*, J.A. 2185H. Plaintiffs, however, submit evidence indicating the contrary. First, forms, purportedly prepared by PTL, which allow for the transfer of LTP benefits on a yearly basis, J.A. 2626, and a letter from PTL to certain LTP holders indicating that their LTPs were in fact transferable, again on a yearly basis, J.A. 2629. Last, PTL records tabulate the number of LTPs "transferred." *See* J.A. 2562-72. A jury might reasonably conclude that this and other references to the increasing value of

the LTPs might lead partners to infer that they had a right to transfer their LTPs. In short, we cannot say with certainty that a jury would necessarily conclude, on the evidence presented, that the LTPs were not transferable. As a consequence, we cannot rule out the possibility that the LTPs offered purchasers the possibility ofrealizing capital appreciation. *See Forman*, 421 U.S. at 854-55, 95 S.Ct. at 2061-62.

Thus, the LTPs cannot be excluded from securities law coverage as a matter of law. This conclusion is buttressed by a 1973 SEC interpretive release, *Offers and Sales of Condominiums or Units in a Real Estate Development*, Securities Act Release No. 5347, 1 Fed.Sec.L.Rep. (CCH) ¶ 1049 (Jan. 4, 1973) (listed at 17 C.F.R. § 231.5347) (acknowledged by the Supreme Court in *Forman*, 421 U.S. at 853 n.17, 95 S.Ct. at 2061 n. 17). The release describes conditions under which offerings of resort condominiums in conjunction with rental arrangements, pursuant to which the condominiums are to be occupied by the owners for part of the year but rented out most of the year, will constitute an offering of securities. The release, after analyzing relevant precedent, concludes:

> [T]he offering of condominium units in conjunction with any one of the following will cause the offering to be viewed as an offering of securities in the form of investment contracts:
>
> 1. The condominiums, with any rental arrangement or other similar service, are offered and sold with

emphasis on economic benefits to the purchaser to be derived from the managerial efforts of the promoter, or a third party designated or arranged for by the promoter, from rental of the units.

2. The offering of participation in a rental pool arrangement; and
3. The offering of a rental or similar arrangement whereby the purchaser must hold his unit available for rental for any part of the year, must use an exclusive rental agent or is otherwise materially restricted in his occupancy or rental of his unit.

1 Fed.Sec.L.Rep. (CCH) ¶ 1049, at 2072. The release contemplates that it would apply "to offerings of all types of units in real estate developments which have characteristics similar to those described herein." *Id.*, at 2071. The reasoning and conclusions set forth in the SEC release seem applicable to offerings of timeshares. [9] Indeed, one leading securities law treatise concludes that "[e]ssentially the same analysis applicable to resort condominiums should apply to timesharing ... offerings." II Louis Loss & Joel Seligman, *Securities Regulation* 970 (1989).

The release's third-numbered paragraph, quoted

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[9] Our use of the term 'timeshares' to describe the LTPs has no bearing on our analysis of whether the LTPs are subject to regulation under the SCTSA. *See supra* note 9.

above, seems applicable in the instant case. The LTPs were offered subject to material restrictions as to partners' rights to occupy the various Heritage, USA resorts. In particular, partners were limited with respect to the amount of time each year that they could make use of the various resorts, and their rights to visit the resorts were conditioned upon the requirement that 50% of the resorts remain available for ordinary patrons who were not LTP holders. In effect, partners were required to hold their "interest" in the resorts available for rent during the majority of the year that they did not make use of the resorts.

Thus, we cannot conclude, on the record before us, that the LTPs are not securities. Such a determination is properly made by a jury. *See Zolfaghari v. Sheikholeslami*, 943 F.2d 451, 456 (4th Cir.1991). We therefore conclude that the district court erred in granting appellees' motion for a directed verdict **[991]** on plaintiffs' federal securities fraud claim against Bakker. We reach a similar conclusion with respect to plaintiffs' state securities fraud claim against Bakker. *See* N.C.Gen.Stat. § 78A-2(11) (defining "[s]ecurity" to include "investment contract").

STATUTES

Securities Act of 1933 § 2(1), 15 U.S.C. § 77b(1)

(1) The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

Supreme Court, U.S.
FILED
AUG 31 1998
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No. 98-74

In The

Supreme Court of the United States

October Term, 1997

JOSEPH W. TEAGUE and HELEN B. TEAGUE, STEVEN ALLEN BARKER, RITA STRAHOWSKI, SWANNEE BECK and KAREN PEREZ TUCKER, Lifetime Partners of PTL, As Representatives of a Nationwide Class consisting of 150,290 PTL Lifetime Partners and of 27,839 Persons Who Partially Paid for Lifetime Partnerships,
Petitioners,

vs.

JAMES O. BAKKER, DAVID A. TAGGART and AIMEE CORTESE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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STATEMENT OF THE CASE

The purported "questions presented" by Petitioners materially misstate the facts and circumstances surrounding this litigation. First, the District Court's charge to the jury concerning the nature of the inducement to the Plaintiff Lifetime Partners was fully consistent with and required by this Court's prior securities law decisions in *Forman* and *Howey*, and by multiple applications of those decisions by lower courts. More importantly, the charge itself was a logical and necessary application of all the principles enunciated by this Court in previous securities law opinions. The District Court did not add a "fourth element" to the *Howey* test, nor did the District Court's charge conflict with *United Benefit Life* which is wholly inapposite to this case. Moreover, there is no "split" in the circuits on this issue, as the language used by the District Court was mandated by the Supreme Court's prior opinions on these issues in *Howey* and *Forman*.

Similarly, the Petitioners' argument with respect to the risk capital test also distorts the record as to the handling of this issue by the District Court, and is simply a creation out of whole cloth. In fact, the risk capital charge provided to the jury by the District Court ***was itself drafted by the Petitioners***, and expressly consented to by Petitioners. The charge itself was vigorously objected to by Defendant-Respondents, and the Court ordered the charge included over defense objections. As a review of the charge reflects, the risk capital charge clearly ***excluded*** the "primarily for profit" requirement objected to by Petitioners with respect to the *Howey* test. The jury was instructed ***independently and separately*** on the risk capital test, with language ***written by Petitioners***, which language clearly ***excluded*** any requirement that the jury find that the inducement to purchase the LTPs was "primarily for profit". In short, Petitioners' argument with respect to the risk capital test is

belied by the clear facts established in the record of this proceeding. Petitioners have no justiciable issue with respect to the risk capital test.

Finally, with respect to the invocation of the Fifth Amendment by Defendant Bakker in response to deposition inquiry prior to the 1996 re-trial, Petitioners conveniently fail to inform the Court that there are ***no*** statute of limitations in the states of North Carolina or South Carolina for securities fraud, which are felonies under the criminal code in both those States. Bakker's invocation of his Fifth Amendment rights against this backdrop, given the fact that Bakker has ***not*** been immunized by either State or Federal authorities, is as basic and fundamental an application of the Fifth Amendment as could be imagined. Moreover, there is no "split" in the circuits with respect to the application of the Fifth Amendment privilege on these facts. The purported split which is suggested by Petitioners is premised upon facts which do not exist in this case, and which are clearly distinguishable from this case.

PROCEDURAL AND FACTUAL HISTORY

The facts surrounding the PTL Lifetime Partnership program and the fall of televangelist Jim Bakker have been amply documented in numerous appellate decisions over the course of the past decade. *See, e.g., United States v. Bakker*, 925 F.2d 728 (4th Cir. 1991); *Benton v. Bakker*, 92 B.R. 1000 (1988), *aff'd*, 944 F.2d 901 (4th Cir. 1991); *Teague v. Bakker*, 35 F.3d 978 (4th Cir. 1994), *cert. denied*, 513 U.S. 1153 (1995) (hereinafter "*Teague I*"). Mr. Bakker was previously convicted of mail and wire fraud, and spent almost five years in prison for these offenses. In the civil case, he was found liable for common law fraud as a result of the oversales of LTPs in various hotel projects at the PTL ministry.

In 1990, at the time of the first civil trial of this class action, Plaintiff/Petitioners argued successfully that Bakker's conduct constituted a massive fraud which resulted in over $129 million in damages to the Plaintiffs. 35 F.3d 978, 995. That fraud judgment was affirmed, as was Bakker's earlier criminal fraud conviction, *United States v. Bakker*, 925 F.2d 728 (4th Cir. 1991). In the appeal of the civil fraud verdict, the Fourth Circuit Court of Appeals remanded for trial of securities fraud claims against Bakker which had been dismissed by the District Court at the close of the original civil trial in December of 1990.[1] 35 F.3d 978, 990-91, 997.

TEAGUE I

In *Teague I*, the Fourth Circuit determined that ***only*** where the inducement to participate in an investment is ***exclusively*** for profit, or ***exclusively*** for personal consumption, can the District Court properly decide ***as a matter of law*** the question of whether an offering constitutes a security. 35 F.3d 988. *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837 (1975); *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293 (1946).

Teague I also held that where there is evidence to support ***both*** a financial motive ***and*** a personal use motive, the question of whether a particular product constitutes a security cannot

1. Amazingly, after nearly three months of trial in 1990, and a nearly 4-year appeal to the Fourth Circuit, Petitioners at the second trial in 1996, unilaterally abandoned their $129 million fraud judgment against Bakker (which had been upheld on appeal) ***for no consideration***, and argued that Bakker was really only ***negligent*** in his conduct. Petitioners' strategy was clear: they hoped to obtain a verdict at the second trial which was inconsistent with the prior fraud verdict, in order to bootstrap an argument that they were entitled to Director's and Officer's liability insurance coverage for Bakker's fraud. The District Court permitted this blatant gamesmanship, over defense objections. (A.159, 163).

be determined ***as a matter of law*** by the Court, and must instead be a matter determined by a jury after trial. 35 F.3d 978, 989.

It is thus clear from *Teague I* that the jury would be asked to look at all of the evidence of different inducements offered to the Lifetime Partners, to determine what was the ***primary, controlling or dominant*** inducement. Acknowledging that the individual motivations of the Lifetime Partners themselves confirmed their desire to obtain personal use by virtue of their participation in the LTP, *Teague I* nevertheless held that in the face of competing evidence suggesting a financial inducement, the issue of whether the LTPs were securities could not properly be determined by the Court ***as a matter of law***, and required a jury's determination. 35 F.3d 989, 990.

Thus, at the second trial in 1996, each side set about the task of showing the jury all evidence which each could muster to support their theory of what the ***primary*** inducement to the Lifetime Partners had been in connection with this LTP program.

Plaintiff-Petitioners relied on the same evidence offered at the previous trial in 1990, selectively isolating certain words and phrases from the voluminous brochures and mailings which had emanated from PTL. Specifically, Plaintiff-Petitioners highlighted the use of the terms "investment" and "appreciation" and repeatedly cited Bakker's enthusiastic promotional efforts on television. (Tr. 173-177). Significantly, there was ***no*** evidence offered to suggest that the partners expected anything more than savings on hotel accommodations in the future as a result of their personal use of the facilities. No partner testified about an expectation or the right to participate in earnings. No partner testified that he/she had ever attempted to sell his/her partnership for a profit, and no partner testified that he/she was aware of the sale of a partnership for profit, or otherwise.

The defense pointed out that words in the PTL literature like "investment" and "appreciation", which had been repeatedly emphasized by Plaintiffs, were but a very small part of the overall presentation which induced people to participate in the LTP program. As a review of the brochures themselves indicate, (A. 431-439, 521-547), the inducement to these partners, in substantial part, had virtually nothing to do with financial considerations. These Plaintiffs, most of whom were regular viewers of the Jim Bakker cable television program, were attracted by PTL's promise of a unique Christian environment, where those who wished to participate with other Christians in a special wholesome, Christian environment could come with their families and instill in them the values which these people were interested in living by and promoting. (A. 431-439, 521-547).

PTL was enthusiastically described as a Christian oasis and a spectacular Christian theme park which offered extraordinary amenities which could only be enjoyed by ***using*** the facilities at PTL with one's family. (Tr. 270-71, 782-83). The jury concluded that despite words like "investment" and "appreciation", these brochures, read in their entirety, proved that the allure to would-be purchasers was wholly unrelated to profit. (A.431-39, 521-47).

The defense also introduced video taped evidence which had not been seen in the prior trial. These videotapes were shown to the jury at the close of the defense case and completely gutted any suggestion that Bakker had ever represented to the partners that the LTPs could be sold, willed, inherited, or in any way converted for profit, thus disproving Plaintiff-Petitioners' theories of capital appreciation. (Tr. 1280-1305).

Though certain partners testified that they thought the partnerships might be "transferable", Plaintiff-Petitioners

adduced no evidence to show that the LTPs could be sold to a third party. In fact, the best Plaintiff-Petitioners could offer was a feeble attempt to demonstrate "transferability" by virtue of PTL's permitting partners to allow others to use their hotel facility in their place for a single yearly stay. (A. 610-611). Not a single partner testified that he believed that this right to permit others to use their facilities on an annual basis was the same as the ability to sell for a profit; indeed, a casual reading of these forms would have revealed no such right. (A. 610-611).

The evidence showed that out of more than 160,000 LTPs sold by Bakker, ***not one partner*** ever attempted to resell their LTP to a third party — this despite the overwhelming evidence submitted that partners were extremely dissatisfied with the LTPs almost from the moment they had sent in their money. (Tr. 816).

Plaintiff-Petitioners attempted to discount this compelling evidence by seeking to convince the District Court that evidence of the actual motivations of the partners themselves was not relevant. (Tr. 200-202; 1333-1335). The District Court properly rejected this argument, finding that the actual motivations of the purchasers, while not dispositive in the face of conflicting evidence of financial inducements, was still relevant to the jury in making its ultimate determination as to what was the ***controlling*** inducement. (Tr. 202; 1335).

The defense case brought to the Court's attention new evidence which had never been seen before at the first trial. First, Defendant-Respondents offered, over Plaintiffs' vigorous objection, 192 questionnaires prepared by the Federal Bureau of Investigation and Postal Inspectors reflecting information obtained from Lifetime Partners during the course of the criminal investigation which resulted in Bakker's indictment

in 1989. (Tr. 1086-1095). These questionnaires, were answered by the partners who were most disgruntled with Jim Bakker and the LTP Program; they reflected the contemporaneous thoughts and expectations of the purchasers of these LTPs, which preceded both Bakker's indictment and the first trial of this lawsuit. (Tr. 1085).

All Lifetime Partners who answered these questionnaires confirmed that their reasons for buying the LTP was to enjoy the PTL ministry and to ***use*** the partnership once a year with their family. ***Not one partner ever indicated an intent to purchase the LTP in order to make a profit.***[2]

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2. Moreover, the partners who actually testified at trial, also confirmed these inducements to purchase. For example, Plaintiff Annette Watson testified:

> Q: When you bought the partnership, you weren't buying it so that you could sell it to someone else for a profit, right?
>
> A: No, not with this type of thing, no. (Tr. 440).

Rita Strahowski, also a name Plaintiff, confirmed her intentions:

> Q: You didn't intend to sell it at the time you purchased it?
>
> A: No, I certainly didn't.
>
> * * *
>
> Q: Alright. So it was not something that you intended 10 or 15 years down the road to sell like stock or bonds or something like that, to make a profit, was it?
>
> A: No, I bought it strictly for the benefit of my family to have a vacation place to go. (Tr. 568).

Name Plaintiff Swanee Beck also conceded:

> Q: Did you intend to sell it?

(Cont'd)

(Cont'd)

A: No. I didn't intend to sell it at that time. I intended to use it. (Tr. 882).

Q: So as I understand it, you bought these partnerships to use these partnerships, correct?

A: Yes.

Q: And if you didn't use them, there would have been no real purpose in buying them, correct?

A: That's right, because they had no value to me had I not.

Q: If you didn't use them?

A: Right. (Tr. 785).

Name Plaintiff Brenda Levy:

Q: Did you ever have any intent to sell your Lifetime Partnership?

A: No, indeed. I saw it as a place where my family could come from various areas of the United States, and that by having enough partnerships, I would have time so everybody could come and we could have a holiday together once a year. (Tr. 976).

Finally, Plaintiff Barbara Schmidt:

Q: And if you didn't go to the PTL and you didn't stay at the bunkhouse, the partnership was worth nothing, correct?

A: That's correct.

Q: And let me ask you this: Did you ever have any expectation of getting anything more than the week of staying at the bunkhouse once a year for the rest of your life?

A: No, sir. That was the expectation I had, that my family could — my husband and myself and my children can go once a year for vacation. (Tr. 1190-1200).

Defendant-Respondents offered testimony from individuals who were clearly in a position to know whether anyone had ever sought to sell these LTPs. Testimony was adduced from representatives of the biggest newspaper in North Carolina, the Charlotte Observer, from a prominent local stockbroker and from an auctioneer, all of whom were familiar with the LTP Program, but none of whom had ever heard of anyone selling or attempting to sell their LTP. (Tr. 1065, 1244, 1259).

This was the case that went to the jury on July 22, 1996 for determination. The defense argued one issue only: the LTPs were not securities. The defense conceded that the partners had been defrauded by virtue of the oversales of the partnerships which had made it impossible for partners to gain access to and use the facilities as they had hoped. It was left to the jury to determine whether the various inducements demonstrated by the evidence presented were such as to make the LTPs securities, or if not, whether the LTPs were securities under the alternative "risk capital" test.[3]

When the jury returned after two hours of deliberations, they answered the sole issue posed by the defense — LTPs were ***not*** securities under ***either*** test.

TEAGUE II

Following the second civil jury verdict in 1996, Petitioners sought relief on appeal once again to the United States Court of Appeals for the Fourth Circuit. Petitioners argued, *inter alia*,

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3. Plaintiff-Petitioners had obtained at the second trial in 1996, over defense objections, an alternative charge by which the jury could find a security under the "Risk Capital" test. This charge was drafted by Plaintiff-Petitioners, and specifically ***excluded*** any requirement that the jury make any determination as to the primary inducement.

that the District Court's charge with respect to the primary inducement to the purchasers was contrary to the law as required by this Court in *Forman* and *Howey*.[4] Essentially, the Fourth Circuit in *Teague II* rejected the Petitioners' arguments because they confused the standards applicable to decisions made by the trial courts ***as a matter of law***, and those decisions properly left for a jury. (Slip Opinion at p. 6). *Teague II* recognized that where the facts of a case indicate that a transaction is ***solely*** for the personal use or consumption of the purchaser, the court is empowered to determine as a ***matter of law*** that such products do not constitute securities. *Teague II* recognized that on the other side of the spectrum, the Supreme Court had held in *Howey* that transactions which induced purchasers to participate ***solely*** for profit are securities ***as a matter of law***. But *Teague I* had identified ***both*** possible inducements, where ***both*** personal use ***and*** the potential for profit may have been evident in the record. Consequently, as the Fourth Circuit held in *Teague I*, it was a jury determination.

The District Court's charge to the jury in the second trial that "[i]f the investors were attracted primarily by the prospect of acquiring use and not by financial returns on investment, there is no security" was recognized by the Fourth Circuit in *Teague II* as a commonsense application of the long established principles of securities law enunciated by this Court in *Howey* and *Forman*. *Teague II* thus held that "the jury charge adequately conveyed to the jury that it was to determine whether consumption or investment was ***the dominant*** theme of the transaction". (Emphasis added). (Slip Opinion at p. 6).

Finally, with respect to Bakker's invocation of his Fifth Amendment rights at pre-trial depositions in 1996, the only other

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4. No argument was made by Petitioners at either the District Court or Court of Appeals level that this charge was contrary to the requirements of *SEC v. United Benefit Life*, 387 U.S. 202 (1967). This allegation surfaced for the very first time in the current petition for certiorari.

issue which the Fourth Circuit deemed worthy of comment in *Teague II*, the Court upheld the obvious propriety of Bakker's reliance on the Fifth Amendment where, as here, he had ***not*** been immunized on a state or federal level for securities fraud (or any other crimes), and there is ***no*** statute of limitations for securities fraud in North Carolina or South Carolina, where the complained-of acts occurred. Given these facts, the Court in *Teague II* properly concluded that "Bakker would have taken a palpable risk had he testified." (Slip Opinion at p. 6). As the Court explained:

> It may well be that there is little current likelihood of prosecution; on the other hand, the unlikeliness is the result of prosecutorial discretion, and new information could always re-ignite interest. ***Bakker has the right to refuse to provide the kindling***.

(Emphasis added). (Slip Opinion at p.6).

REASONS FOR DENYING THE WRIT

I. PETITIONERS IMPROPERLY SEEK TO IMPOSE A DIRECTED VERDICT/SUMMARY JUDGMENT STANDARD UPON THE DELIBERATIONS OF THE JURY.

The entire premise of Petitioners' argument as to the jury charge in *Teague II* is faulty. It confuses the standard applicable to determinations by the Court ***as a matter of law***, with the standard applicable to jury determinations in the face of conflicting evidence. The charge which the Court ultimately gave to this jury properly reflected the process which the jury ***had*** to undertake in order to reach a proper determination as to whether LTPs constituted securities. If, as Petitioners now urge, the proper standard to exclude securities coverage in the face of competing evidence is whether the ***sole*** inducement

was personal consumption, then the Fourth Circuit would have directed a verdict in favor of Plaintiffs in *Teague I*, since it was clear that personal consumption was not the ***sole*** inducement. 35 F.3d 978, 989. Indeed, that is precisely why a jury trial was required on securities law violations.

A. The jury charge was consistent with *Forman* and *Howey*.

The test for whether a product constitutes an investment contract and hence a security was enunciated by the Supreme Court in *S.E.C. v. W.J. Howey & Co.*, 328 U.S. 293 (1946). In *Howey*, the question before the Court was whether the sale of orange groves in interstate commerce, to be managed and harvested on an aggregate basis for profit, constituted a securities offering which was required to be registered with the S.E.C. 328 U.S. 293, 297. The District Court in *Howey* had ruled ***as a matter of law*** that orange groves sold by contract were not securities. 328 U.S. 293, 294. The Fifth Circuit affirmed, and the Supreme Court granted *certiorari* on whether the sale of these orange groves constituted investment contracts covered by the securities laws. 328 U.S. 293, 294.

The *Howey* Court reversed and held ***as a matter of law*** that these transactions were investment contracts covered by the securities laws. 328 U.S. 293, 300. The Court explained:

> The transactions in this case clearly involve investment contracts as so defined.
>
> * * *
>
> [The Purchasers] reside in distant localities and . . . lack the equipment and experience requisite to the cultivation, harvesting and marketing of the citrus products. Such persons have no desire to occupy

> the land or to develop it themselves; they are attracted ***solely*** by the prospects of a return on their investment.

328 U.S. 293, at 299-300. (Emphasis added).

Because the investors "are attracted ***solely*** by the prospects of a return on their investment", the *Howey* Court ruled ***as a matter of law*** that the securities laws apply. 328 U.S. 293, 301.[5] (Emphasis added).

In *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837 (1975), the Court was faced again with a situation where a lower court had ruled as a matter of law, but in this instance, the Court had ruled that the transaction was a security covered by the securities laws. 421 U.S. 837, 846. *Forman* involved the sale of shares in a public housing project known as "Co-op City" in New York City. 421 U.S. 837. Purchasers received stock in a non-profit corporation which entitled them to reside in below market rate leased apartments. When cost overruns forced the actual rental charges to be higher than those originally projected, a class action suit was commenced alleging, *inter alia*, violation of the Federal securities laws. 421 U.S. 837, 844.

The District Court dismissed the Complaint, ruling that the Co-op shares were not securities. The Second Circuit reversed, holding that these shares were securities ***as a matter of law***. 421 U.S. 837, 846. On *certiorari*, the Supreme Court reversed, holding that the shares in the cooperative were not securities ***as a matter of law***. 421 U.S. 837, 858.

Initially, Justice Powell, writing for the Court in *Forman*, rejected the notion that the word "stock" was of any particular significance in determining whether a security existed, reasoning

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5. This assumes of course, that the first two prongs of the *Howey* test have been met, as was conceded in the case at bar. (A.39).

that mere words alone cannot obscure the reality of the transaction. 421 U.S. at 851.

Moreover, the Court also concluded that despite the obvious inducement to purchasers to obtain below market rates on decent housing, such an inducement did ***not*** constitute a profit motivation that would make the transaction subject to the Federal securities laws:

> The Court of Appeals . . . found support for the concept of profits in the fact that Co-op City offered space at a cost substantially below the going rental charges for comparable housing. ***Again, this is an inappropriate theory of "profits" that we cannot accept . . . This benefit cannot be liquidated into cash.***

(Emphasis added). 421 U.S. 855.

* * *

> There is no doubt that purchasers in this housing cooperative sought to obtain a decent home at an attractive price. But that type of economic interest characterizes every form of commercial dealing. What distinguishes a security transaction - and what is absent here — is an investment where one parts with his money in the hope of receiving profits from the efforts of others, and not where he purchases a commodity for personal consumption or living quarters for personal use.

421 U.S. 837, 858.

As a result, the Court in *Forman* upheld a determination ***as a matter of law*** that the shares in Co-op City were not securities subject to Federal securities regulation. 421 U.S. 837, 858-859.

In *Teague I*, the Court addressed a similar question based upon the District Court's determination ***as a matter of law*** that the LTPs were not securities. 35 F.3d 978, 985-86. The District Court had ruled that since all the Plaintiffs had testified that they intended to personally use and consume the LTPs, and not to sell them for profit, then the securities laws do not apply as a matter of law. (A. 119; 35 F.3d 978, 985). On appeal, the Fourth Circuit in *Teague I* reversed, determining that since there was evidence in the record to suggest other inducements in addition to the desire to personally consume the item purchased, the Court could ***not*** decide the issue ***as a matter of law***. 35 F.3d 978, 987. The Court explained that evidence of the purchasers' actual motivations, while relevant, could not be determinative where "the promoter of the scheme in question marketed the scheme by emphasizing the potential for profit." 35 F.3d 978, 988.

In acknowledging the differing inducements suggested by the evidence at trial, *Teague I* concluded that a determination as to whether the LTPs are securities could ***not*** be made by the District Court, but was instead a matter to be decided by the jury at a new trial. 35 F.3d 978, 990.

Thus, *Howey* and *Forman* both hold that a determination as to whether a product constitutes a security can be made ***as a matter of law*** by the Court without a jury ***only*** where the Court can determine from the evidence that the ***sole*** inducement was either to obtain use for personal consumption (no security under *Forman*), or where the ***sole*** inducement was to obtain a return on investment (security under *Howey*). Where the record

suggests two possible inducements which might support either theory, *Teague I* properly determined that the question could not be decided ***as a matter of law*** by the District Court, and sent the matter back for retrial by a jury to determine the ***primary*** inducement.

Hence, the "solely" language of *Forman* and *Howey* simply did not and could not apply on the *Teague II* facts. Where there was conflicting evidence which demonstrated more than one inducement to purchase the LTPs, it was incumbent upon the jury to determine which inducement was ***primary***.[6]

Teague II properly held that the "primary inducement" concept is required by *Forman*, as the author of *Forman* himself acknowledged. (*See* Slip Opinion at p.5). *Teague II* expressly relied upon *Rice v. Braniger Organization, Inc.*, 922 F.2d 788 (11th Cir. 1991), an opinion written by retired Justice Powell who 16 years earlier had written the Supreme Court's opinion in *Forman*. (Slip Op. at p.5). *Rice* specifically endorsed the "primarily for use" analysis when faced with mixed inducements:

> We believe that people buy houses and lots in a beach-club development ***primarily*** to use them, not to derive profits from the entrepreneurial efforts of the developers.

(Emphasis added). 922 F.2d 788, 790-91.

Teague II also recognized similar support for this language in *Aldrich v. McCulloch Properties, Inc.*, 627 F.2d 1036 (10th

6. Petitioners essentially conceded this concept at trial, at one point proposing that the court charge the jury that they must find that purchasers were induced "in substantial part" by profit motivation, in order to find a security. Petitioners later withdrew this proposal, lamely asserting that they had been "mistaken". (Tr. 1308, 1412, 1433).

Cir. 1980). ("[C]learly the lots are not securities if the purchasers were induced to obtain them ***primarily*** for residential purposes — to occupy the land or develop it themselves".)

B. There was no "fourth" element added to the *Howey* test.

Petitioners' assertion that the District Court had grafted on to the *Howey* test a purported "fourth element" by utilizing the terminology that the jury must find the primary or dominant inducement of the transaction, completely misconstrues the facts. The Court properly charged the three (3) elements required by the *Howey* test: (1) an investment of money; (2) in a common scheme or enterprise; (3) with the expectation of profits garnered most essentially from the efforts of others. *See SEC v. W. J. Howey Co.*, 328 U.S. at 300, 66 S. Ct. at 1103; *United Housing Foundation, Inc. v. Forman*, 421 U.S. at 853, 95 S. Ct. at 2060.

The issue in *Teague II* was the precise method for charging the jury on the "expectation of profit" element when the profit inducement is not the only inducement evident in the record. *Teague I* at 989-990. *Teague II* (Slip Op. at p.5). The Court properly gave the same three-part test mandated by *Howey*, with a necessary explanation about the profit expectation requirement as interpreted by *Forman*. There was no fourth element added to the *Howey* test.

C. There is no split in the circuits as to the requirements of *Howey* and *Forman*.

Petitioners' attempt to attract this Court's interest by suggesting the existence of a split in the circuits over the propriety of the District Court's charge on the *Howey* test is a red herring. There is no split in the circuits.

Petitioners' purported reliance on allegedly conflicting decisions from the Sixth, Ninth and Second Circuits is unavailing. *Newmyer v. Philatelic Leasing, Ltd.*, 888 F.2d 385 (6th Cir. 1989), *cert. denied*, 495 U.S. 930 (1990), is not in conflict with *Teague II*. *Newmyer* involved the sale of tax shelters in the form of leased investments in certain postage stamps. Simply stated, *Newmyer* stands for the exact same proposition as *Teague I* which held that in cases of mixed inducements (*i.e.*, profit and/or personal use), the question of whether a product constitutes a security is a question of fact to be determined by the jury. 888 F.2d 394. Recognizing that the Plaintiffs were "not motivated by a quixotic desire to paste hundreds of thousands of identical stamps in their own album", the Court explained:

> Although the Plaintiffs in the case at bar were attracted in part by the expectation of substantial tax advantages, it is certainly open to them to try to prove they had a profit motive too.

888 F.2d 392.

In short, *Newmyer* simply confirms that a jury must determine the reach of the securities laws in cases of mixed inducements. Hence, there is no split between *Teague II* and the Sixth Circuit.

Similarly, Petitioners' claim that the Ninth Circuit law is contrary to the holding in *Teague II* is also inaccurate. *SEC v. Goldfield Deep Mines Company of Nevada*, 758 F.2d 459 (9th Cir. 1985). *Goldfield* also involved tax shelters, but was a challenge of a jury verdict finding that the securities laws ***did*** apply to the product there at issue. *Goldfield* also involved mixed inducements wherein the defense had argued that since the focus of the inducement to purchasers were tax benefits

which did ***not*** constitute an expectation of profit, 758 F.2d 464, sale of such tax shelters did not constitute the sale of unregistered securities. The jury disagreed, and found a violation of the securities laws. The Ninth Circuit affirmed, explaining that the prospect of tax benefits resulting from initial losses did not necessarily rule out an expectation of profit separate and distinct from this benefit. Citing the aggressive sales literature which promised profits on their investment, the Court explained that the jury could have found on the evidence that an expectation of profit, independent of anticipated initial tax benefits, was the inducement to prospective investors, thereby distinguishing it from the holding of *Forman*. 758 F.2d 464 at n.2. There is no conflict between *Teague II* and the Ninth Circuit.

Petitioners' claim of a conflict with the Second Circuit by reliance on *SEC v. Aqua-Sonic Products Corp.*, 687 F.2d 577 (2nd Cir.), *cert. denied*, 459 U.S. 1086 (1982), is also misplaced. In *Aqua-Sonic*, the issue before the Second Circuit was ***not*** whether the Plaintiffs had an expectation of profits, an element which was expressly conceded by the promoters in that case. 687 F.2d at 581. Rather, the issue in *Aqua-Sonic* was whether those profits were properly determined to be derived "solely" from the efforts of others. 687 F.2d at 582. Hence, *Aqua-Sonic* has no precedential value on the issue now before the Court, and does not reflect any conflict between *Teague II* and the Second Circuit.

In fact, the Second Circuit is in complete agreement with *Teague II*, *Forman* and *Howey*. *Grenader v. Spitz*, 537 F.2d 612 (2nd Cir. 1976). *Grenader* involved a set of facts similar to those in *Forman*. The issue was whether Defendants' offer to sell a co-op apartment embodied a profit inducement, or simply the inducement to personally use the apartment as in *Forman*. The Court held, consistent with *Forman*, that the purchasers

of the co-op apartments desired to personally occupy the apartments and were not led to expect profits such as to bring the transaction within the purview of the securities laws. 537 F.2d 619.

D. This Court's decision in *United Benefit Life* is totally irrelevant to the issues now before the Court.

Petitioners' attempt to suggest that *Teague II* is in conflict with *SEC v. United Benefit Life*, 387 U.S. 202 (1967) should be rejected as frivolous. *SEC v. United Benefit Life*, 387 U.S. 202 (1967) has virtually no applicability to the case now before the Court. Nor did Petitioners ever previously allege such a conflict at either the District Court or Court of Appeals level.

United Benefit determined whether a product was exempt from the registration requirements of the securities acts under the terms of the insurance contract exemption of the acts. In evaluating the specific facts in *United Benefit*, the Court concluded that in fact the promoters were offering two distinct products, one which could properly be characterized as insurance (the variable annuity), and one which was properly within the purview of the securities act ("the flexible fund"). In this sense, Petitioners' characterization of *United Benefit* as this Court's "one decision on mixed usage–investment" is a blatant mischaracterization of the decision. In any event, *United Benefit Life* has no applicability to the issues now before the Court.

Indeed, the Fourth Circuit in *Teague II* cited to another Supreme Court decision which did deal with an analogous circumstance to that now before the Court, *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551 (1979), but Petitioners fail to even acknowledge its existence. In *Daniel*, specifically cited in *Teague II* (see Slip. Op. at p.5, n.2), the

Supreme Court held that an employee's interest in a non-contributory, compulsory pension plan is not a security, explaining that the "employee is selling his labor ***primarily*** to obtain a livelihood, not making an investment". (Emphasis added). 439 U.S. at 560. Hence this Court has acknowledged in an analogous situation that in cases involving mixed inducements, it must be determined which inducement was ***primary*** in order to find whether such case falls within the scope of the securities acts.

Nor does *Teague II* conflict with *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344 (1943). In *Joiner*, the SEC had sought to enjoin the sale of leasehold interests in oil wells. After trial, the District Court denied the injunction finding that the oil leases were not securities. The Fifth Circuit affirmed the opinion and the Supreme Court granted *certiorari* and reversed the findings of the lower courts. ("It is clear that an economic interest in this well drilling undertaking was what brought into being the instruments that defendants were selling and gave to the instruments most of their value and ***all*** of their lure") (Emphasis added) 320 U.S. at 349. Here again, Petitioners' assertion of a conflict does not withstand even the most cursory examination.

E. The floodgates have not been opened, Petitioners' shrill protestations to the contrary notwithstanding.

To read Petitioners' argument, one might think that the *Teague II* decision was such a bizarre and reckless departure from the law of securities as developed by this Court in the 55 years since *Joiner*, that hordes of unscrupulous promoters will now jump into the market and exploit this legal aberration to the great and substantial detriment of the investing public, as well as the timeshare resort industry. Of course, nothing could be further from the truth.

First, the reach of the securities laws is largely determined on a case by case analysis, which analysis must always be highly fact sensitive and consistent with the congressional intent which underlies the statutes. *See, e.g., Marine Bank v. Weaver*, 455 U.S. 551, 556 (1982) ("Congress, in enacting the securities laws, did not intend to provide a broad federal remedy for all fraud.") The facts of *Teague I and II* are unique and will not easily be applied to other cases.

Moreover, the "primarily for use or profit" concept has long preceded the *Teague II* opinion. *See, e.g., Grenader v. Spitz*, 537 F.2d 612 (2d Cir. 1976); *Aldrich v. McCulloch*, 627 F.2d 1036 (10th Cir. 1980); *Rice v. Branigar Organization, Inc.*, 922 F.2d 788 (11th Cir. 1991). Petitioners' overstated and unduly dramatic assertions about the impact of *Teague II* on the time share and resort condominium industries is thus unpersuasive. *Teague II* simply applies black letter law which has evolved over the course of the past 55 years. There is nothing "new" or particularly significant about the legal standards enunciated in *Teague II*. Once again, Petitioners' attempts to catch the attention of this Court by grossly overstating its case, must necessarily fail on the merits. In sum, Petitioners "doth protest too much."

The charge to the jury was in all respects appropriate given the evidence of more than one inducement to purchase the LTPs. It was a jury question as to which inducement actually prompted the purchase even though there may have been more than one inducement present. Thus, it was necessary for the jury to determine which inducement was primary. This could only be determined by a jury after a full trial, as it was properly in this case.

II. PETITIONERS HAVE NO JUSTICIABLE ISSUE WITH RESPECT TO THE RISK CAPITAL TEST.

Because Petitioners received everything they asked for from the District Court with respect to the risk capital test (and still lost), they have no remaining justiciable issue which this Court could properly address concerning risk capital. *See, e.g., Flast v. Cohen*, 392 U.S. 83 (1968); *Warth v. Seldin*, 422 U.S. 490 (1975); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976). The risk capital test was charged to this jury as a distinct alternative to the investment contract *Howey* test, over the vigorous objections of the Respondent Bakker. (Tr. 1319). Petitioners acknowledged that the risk capital test had never been adopted in the Fourth Circuit, yet nevertheless argued (successfully) that it was appropriate in this case. (Tr. 1323). The charge to the jury about risk capital was separate and apart from the charge on the *Howey* test. (Tr. 1543). Thus, Petitioners' objections to the charge given under the *Howey* test have no relevance to the risk capital charge which expressly did ***not*** include the "primarily" language objected to by Petitioners. (Tr. 1543). In fact, the charge on risk capital was written and consented to by the Petitioners. (Tr. 1319-1329). The jury simply decided against them — hardly creating a justiciable issue for this high Court.

It is still Respondent Bakker's position that the risk capital test charge should not have been given at all. The risk capital test might have arguably applied had the Petitioners chosen not to abandon their State securities claims, since risk capital appears now to be part of the administrative code in North Carolina. 18 N.C. Adm. Code § 1104(n)(2). But nowhere is there any indication that the risk capital test applies to Federal § 12(2) claims, nor do Petitioners offer any reason why it should. In any event, Petitioners got the risk capital charge which they demanded, over objection. Hence, even if this Court

agreed with Petitioners that the risk capital test should apply to alleged federal securities law violations, the result in this case would remain the same. The jury found against Petitioners on the merits — not because of any legal error in the proceedings. Petitioners therefore have no issue left about which to complain.

III. PETITIONERS' ARGUMENTS WITH RESPECT TO BAKKER'S FIFTH AMENDMENT PRIVILEGE ARE WITHOUT MERIT.

A. Bakker is without immunity for state felony securities violations which have no statute of limitations.

Petitioners' assertion that Bakker waived his Fifth Amendment privilege by testifying in other proceedings is directly contrary to the law. *See, e.g., Pillsbury Co. v. Conboy*, 459 U.S. 248 (1983); *United States v. Cain*, 544 F.2d 1113 (1st Cir. 1976); *United States v. Lawrensen*, 315 F.2d 612 (4th Cir. 1963); *United States v. Miranti*, 253 F.2d 135 (2d Cir. 1958); *In re Neff*, 206 F.2d 149 (3rd Cir. 1953); *In re Morganroth*, 718 F.2d 161 (6th Cir. 1983); *In re Corrugated Container Antitrust Litigation*, 661 F.2d 1145 (7th Cir. 1981) (en banc); *Jeffries v. United States*, 215 F.2d 225, 226 (9th Cir. 1954). Similarly, Petitioners' claim that Bakker no longer faced a risk of incrimination by virtue of any testimony he might give in this trial is again contrary to clear law in North Carolina and South Carolina, where there are ***no*** statutes of limitation for the felony of securities fraud, and where Bakker has not been immunized by either State or Federal authorities. *State v. Johnson*, 275 N.C. 264, 167 S.E. 2d 274 (1969); *State v. Burnett*, 184 N.C. 783, 115 S.E. 57 (1922).[7]

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7. Petitioners' farfetched argument that further prosecution of Bakker could violate the "speedy trial" provisions of the Sixth (Cont'd)

Respondent Bakker never argued that prior testimony which he gave in other legal proceedings could not be admitted against him in this civil trial. However, it is precisely because Bakker did ***not*** previously testify in the substantive areas where Petitioners wished to depose him, that use of his prior testimony was not sufficient for Petitioners' purposes. Hence, Petitioners' current argument that "Bakker testified voluntarily on the same issues at his criminal trial" (*see* Petition, at p. 27) is factually erroneous. If he had, the Petitioners would have had such prior testimony admitted into evidence. It is precisely because Bakker had ***not*** previously testified about these issues, that any claim of waiver must fail.

B. Bakker faced a real possibility of prosecution.

The argument by Petitioners that the risk of further prosecution to Bakker was too "remote and speculative" to justify invocation of his Fifth Amendment rights, is contrary to the facts, as articulated by the District Court, as well as the Fourth Circuit. The District Court specifically reviewed the questions asked by Petitioners, to which Bakker had invoked the Fifth Amendment, and concluded:

> It is evident both on the face of the questions, and reviewing them in this context, that they have incriminating potential. . . . These questions, ***clearly incriminatory***, are not limited to issues of negligence, as Plaintiffs claim.

(Emphasis added). (A. 196). On appeal, the Fourth Circuit agreed, finding that "Bakker would have taken a palpable risk had he testified . . ." (Slip. Op. at p. 6).

(Cont'd)
Amendment was properly rejected in *Teague II* (Slip Op. at p.7, n.3). Nor do Plaintiffs even have standing to raise the issue. *Washington Legal Foundation v. Massachusetts Bar Foundation*, 993 F.2d 962, 971 (1st Cir. 1993); *Harper v. Crocket*, 868 F. Supp. 1557, 1574 (E.D. Ark. 1994).

Moreover, as the District Court properly noted, "[o]nce incriminating potential is found to exist, courts should not engage in raw speculation as to whether the government will actually prosecute." (A.196). (Citing *United States v. Sharp*, 920 F.2d 1167, 1170 (4th Cir. 1990) (A. 196); *See also In re: Corrugated Container Antitrust Litigation*, 661 F.2d 1145, 1153 (7th Cir. 1981) ("Any doubt as to the likelihood of possible prosecution must be resolved in favor of the witness."); *United States v. Miranti*, 253 F.2d 135, 139 (2d Cir. 1958). (The validity of the privilege cannot be grounded on a court's assessment of the likelihood of prosecution, because predicting the behavior of prosecutorial authorities is not a reliable basis for assessing the risk of prosecution.)

In evaluating this issue, lower courts must also be mindful of this Court's long stated admonition to liberally construe the Fifth Amendment's protections. *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892) (Privilege must be broadly construed in favor of the right it was intended to secure); *Arndstein v. McCarthy*, 254 U.S. 71, 72-73 (1920) (Privilege must be accorded broad construction); *Hoffman v. United States*, 341 U.S. 479, 486 (1951) (Privilege must be accorded liberal construction); *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964) (Fifth Amendment construed to protect a state witness under federal law.); *New Jersey v. Portash*, 440 U.S. 450, 453 (1979) (Fifth Amendment construed to prohibit use of immunized testimony on cross-examination.)[8]

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8. Petitioners also fail to address the District Court's finding that compelled testimony of Bakker could have been used against him in a possible perjury prosecution. (A. 196). *See, e.g., In re Morganroth*, 718 F.2d 161, 165 (6th Cir. 1983) ("When a witness is asked a question in a subsequent proceeding, the answer to which could show that he has already committed the crime of perjury in a prior proceeding, his refusal to answer is permissible almost by the definition of self-incrimination.") *See also Pillsbury Co. v. Conboy*, 459 U.S. 248, 255 (1983) at n.14.

C. There is no split in the circuits.

As a result of Petitioners' factual misstatements about Bakker's prior testimony, and Petitioners' failure to acknowledge either that there are no statutes of limitation for state securities fraud, or that Bakker had never been immunized, Petitioners' attempt to create a split in the circuits on this issue must be rejected. Petitioners' assertion that *Ellis v. United States*, 416 F.2d 791 (D.C. Cir. 1969) would lead to a contrary result in this case is simply inaccurate. In holding that the individual who sought to invoke his Fifth Amendment rights had previously waived his rights by testifying before the Grand Jury with knowledge of his privilege, the D.C. Circuit nevertheless explained:

> [T]he waiver carries through ***unless there is new material or possibly new conditions that may give rise to further incrimination***.
>
> * * *
>
> We repeat, for emphasis, that our holding does ***not*** apply when the witness is himself accused or under indictment. We also hold that the witness . . . may object to any questions that would require disclosure of ***new*** matters of substance.

(Emphasis added). *Ellis v. United States*, 416 F.2d at 805.[9]

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9. Moreover, even if *Ellis* is deemed inconsistent with *Teague II*, at least one Circuit Court has opined that *Ellis* may no longer be good law, in light of this Court's decision in *Pillsbury Co. v. Conboy*, 459 U.S. 248 (1983). *In re: Morganroth*, 718 F.2d 161, 165 (6th Cir. 1983) at n.1. *See also United States v. Johnson*, 488 F.2d 1206, 1209 (1st Cir. 1973) (*Ellis* holding "seriously questioned").

Given this clear qualification of its holding, there is no question that application of *Ellis* to the facts of the case now before the Court would result in the same ruling affirmed in *Teague II*. There can be no waiver with respect to substantive information not previously provided by the witness, and any waiver which did attach to prior testimony would not carry through to different legal proceedings, assuming the risk of incrimination is still evident. *See, e.g., Pillsbury Co. v. Conboy*, 459 U.S. 248, 262 (1982) (Witness entitled to invoke the Fifth Amendment in a subsequent civil proceeding, to the same questions which witness had previously answered in the grand jury under a grant of immunity.) *United States v. Licavoli*, 604 F.2d 613 (9th Cir. 1979) *cert. denied*, 446 U.S. 935 (1980); *United States v. Cain*, 544 F.2d 1113 (1st Cir. 1976); *United States v. Lawrensen*, 315 F.2d 612 (4th Cir. 1963); *United States v. Miranti*, 253 F.2d 135 (2d Cir. 1958).

Petitioners' purported reliance on *Walker v. Lockhart*, 763 F.2d 942 (8th Cir. 1985) is even further off the mark. Simply stated, *Lockhart* does not address the question of a waiver of Fifth Amendment privilege. Its inclusion in the Petition is therefore a mystery.

Nor are this Court's prior decisions in *Harrison v. United States*, 392 U.S. 219 (1968), and *Reina v. United States*, 364 U.S. 507 (1960) of any significance to the issue now before the Court. *Harrison* did not involve the question of a waiver with respect to the Fifth Amendment privilege. *Reina* is cited simply for *dicta* which on its face does not apply to the facts of this case.

Where, as here, an individual faces questioning in an area where criminal liability attaches, without any statute of limitation, and where, as here, the witness is a high profile white collar criminal defendant who has not been immunized for such conduct, black letter law mandates the propriety of the invocation of the Fifth Amendment by that witness. There is nothing in any case cited by the Petitioners which would warrant a different result on these facts.

cited by the Petitioners which would warrant a different result on these facts.

CONCLUSION

For all the reasons set forth herein, Respondents respectfully request that the Petition for Writ of Certiorari be denied in all respects.

Respectfully submitted,

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